Supreme Court, U.S.
FILED
NOV 14 2005
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No. 05-611

In The

Supreme Court of the United States

STATE OF NORTH DAKOTA
and STATE OF SOUTH DAKOTA,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns a long, bitter dispute over allocating Missouri River water among seven states and a number of Indian tribes. The water is allocated under neither a decree nor an equitable apportionment agreement. It is allocated by the Army Corps of Engineers under the 1944 Flood Control Act. The Act requires that the Corps equitably balance the many uses to which the river is put. Uses include municipal drinking water, commercial navigation, recreation, farmland irrigation, industrial water supply, and hydropower generation. The court below, relying on a two-sentence dictum in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988), that misread the 1944 Act, improperly allocated water for downstream navigation, giving priority to a use that provides less than 1% of the river's economic benefits. The court below rejected a balanced allocation that respects all interests in the basin. It also rejected the Corps' statutory interpretation that conforms to the Act's plain language, thereby failing to give any deference to the agency. The question presented is:

> Whether the two-sentence dictum in *ETSI Pipeline*, which gives navigation a priority at the expense of other uses, should govern how Missouri River waters are allocated?

RULE 14(1)(b) STATEMENT – LIST OF PARTIES

The following are parties to the proceeding below:

State of Missouri
State of Nebraska
State of North Dakota
State of South Dakota
Mandan, Hidatsa, & Arikara Nation

United States Army Corps of Engineers
United States Department of the Interior
United States Fish & Wildlife Service

American Rivers
Environmental Defense
National Wildlife Federation
Iowa Wildlife Federation
Kansas Wildlife Federation
Montana Wildlife Federation
Nebraska Wildlife Federation
North Dakota Wildlife Federation
South Dakota Wildlife Federation
Izaak Walton League of America, Inc.

MO-ARK Association, a Kansas non-profit
Ergon Asphalt & Emulsions, Inc.
Magnolia Marine Transport Co.
Blaske Marine, Inc.
Koch Materials Co.
Mid-West Terminal Warehouse Co., Inc.
Tosco, a subsidiary of Phillips 66 Co.
Jebro, Inc.
Memco Barge Line, Inc.
Coalition to Protect the Missouri River, a Missouri non-profit
ConocoPhillips Co.

RULE 14(1)(b) STATEMENT –
LIST OF PARTIES – Continued

Midwest Area River Coalition 2000, a Missouri non-profit
Missouri River Technical Group, an Iowa non-profit
Missouri River Energy Services, Inc.
Nebraska Public Power Dist.

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PETITION FOR A WRIT OF CERTIORARI

North Dakota and South Dakota respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 421 F.3d 618. App. at 1. The opinion resolved a number of cases filed in several different districts that were later consolidated in the District of Minnesota by the Federal Judicial Panel on Multi-District Litigation. The District of Minnesota's decision is at 363 F.Supp.2d 1145. App. at 35.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the 1944 Flood Control Act, Pub. L. No. 78-534, 58 Stat. 887 (1944), are in the Appendix at 90-113.

STATEMENT

A. Introduction

"A river . . . offers a necessity of life that must be rationed among those who have power over it." *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (Holmes, J.). This case is about adhering to Congress' plan to assure a fair rationing of Missouri River waters among the seven states and six Indian reservations through which it flows – Montana, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, and reservations at Fort Peck, Fort Berthold, Standing Rock, Cheyenne River, Lower Brule, and Crow Creek. It is about whether North and South Dakota, states that made profound sacrifices to protect the basin from floods, will be allowed an appropriate measure of benefit from the reservoirs built in the two states; reservoirs that flooded towns, farms, ranches, and more than a million acres of some of their best land.

Congress' plan was to use the river to develop the economies in the basin. The Dakotas, in return for the reservoirs' presence, were promised immense irrigation projects. That promise was not kept. The Dakotas, however, built for themselves a recreation industry, of which Lakes Oahe and Sakakawea are cornerstones. But the lake-based recreation industry is jeopardized by the ruling below. The court of appeals – relying on an erroneous reading of the 1944 Flood Control Act in two sentences of *ETSI Pipeline* dictum – held that the Corps of Engineers is not obligated to use Missouri River waters efficiently and economically, but must give priority to the lavish water needs of the small, marginally economic, downstream navigation industry, an industry worth only $9 million annually and one that provides less than 1% of the river's economic benefits. A navigation priority undermines endangered

species recovery and adversely affects such uses as hydropower and recreation, uses with annual values of $674 million and $87 million. As a long-time participant in Western water issues states: "The Missouri River is fundamentally unfavorable to commercial navigation. . . . [N]avigation will never develop in a meaningful way . . . " John E. Thorson, *Voyage of Rediscovery: Lessons from Lewis and Clark for Missouri River Managers*, 6 Great Plains Nat. Resources J., 121, 125 (2002).[1]

B. Statutory Background

In 1944 the Corps of Engineers proposed a management plan for the Missouri River. H.R. Doc. No. 78-475 (1944). The primary author was Col. Lewis Pick and so the Corps' plan became known as the "Pick Plan." It recommended constructing five dams on the river and described the proposed reservoirs as "multiple-purpose" facilities. *E.g.*, *id.* at 26, 27-28, 30. Its plan was to provide for the "most efficient" use of the river "for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." *Id.* at 29.

The Bureau of Reclamation presented a plan authored by William Sloan that proposed three dams. S. Doc. 78-191 (1944). The Sloan Plan was also for "multiple purposes." *Id.* at 1. Not only were navigation, irrigation, water supply, and power generation mentioned, but the Secretary of the Interior stated that "[s]ubstantial and material

[1] Thorson was appointed by the Arizona Supreme Court in 1990 as Special Master for general stream adjudications and served ten years. He has written dozens of articles on water resources law and policy and chaired the ABA's Water Resources Committee.

benefits would accrue through recreational use of the waters and facilities proposed." *Id.* at 2. The plan would "create exceptional opportunities for expanding fish and wildlife programs," and its reservoirs would "provide recreational opportunities of major importance." *Id.* at 13.

The Corps and Bureau reconciled their differing plans in a Joint Report. App. at 100. In the 1944 Flood Control Act Congress adopted the two plans "as revised and coordinated by [the Joint Report]." App. at 97. The Report states that the basin's development is to secure benefits for "flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." App. at 109. The Joint Report, and Congress through its adoption of the Report, did not set priorities among these uses.[2]

C. Factual Background

Under the 1944 Flood Control Act five dams were built on the Missouri River. Garrison Dam in North Dakota formed Lake Sakakawea. The lake is huge. It extends 178 miles and has 1,300 miles of shoreline. *North Dakota v. United States Army Corps of Engineers*, 270 F.Supp.2d 1115, 1129 (D.N.D. 2003). Four reservoirs are in South Dakota and one, Lake Oahe, is as large as Lake Sakakawea. *Id.* It extends into North Dakota. *Id.*

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[2] There is an exception to this. The O'Mahoney-Milliken amendment, 33 U.S.C. § 701-1(b), gives priority to upstream consumptive uses, such as appropriations for irrigation and drinking water. App. at 92. These uses have priority over navigation. *Id.* The district court agreed that the Amendment sets this priority. App. at 45. That ruling was not appealed and is not an issue in this proceeding. In addition, the court below ruled that flood control is a "dominant function" of the Act. App. at 15. The Dakotas do not challenge this ruling.

Construction of Missouri River dams came at a price. They were built "at great cost to the upper Missouri basin states and their inhabitants." Robert E. Beck, *A Book Review of River of Promise, River of Peril: The Politics of Managing the Missouri River*, 1 Great Plains Nat. Resources J. 477, 479 (1996). South Dakota lost 520,000 acres to the reservoirs and North Dakota sacrificed 584,000 acres. *Id.* Huge amounts of rich farm land as well as towns were inundated. Flooding riparian lands upset "[t]he ecological balance of the entire region, and that of the Dakotas in particular." Michael L. Lawson, *Dammed Indians: The Pick-Sloan Plan and the Missouri River Sioux, 1944-1980*, at 194 (1982). "The inundation of precious forests and bottomlands not only eliminated the natural wildlife habitat but also created serious erosion problems." *Id.* Lake Sakakawea's cut banks erode at rates as high as 19 feet a year. JA 07287. The Mandan, Hidatsa, and Arikara Nation describes the erosion as "'extensive.'" *Id.* Thus, the loss of agricultural land in the upper basin continues and unstable banks expose and destroy sacred and cultural sites. JA 08421-22, 08434-44 (Tribal Stmts.).[3]

For their sacrifices, the upper basin states were to receive massive irrigation projects. *E.g.*, *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 508 (1988); *James River Flood Control Ass'n v. Watt*, 553 F.Supp. 1284, 1287 (D.S.D. 1982). This promise remains unfulfilled. *E.g.*, *ETSI Pipeline*, 484 U.S. at 509, n.5; *North Dakota*, 270

[3] Citations to "JA" are to the Joint Appendix filed with the court below. Unless otherwise noted, all Joint Appendix citations are to the Corps' 2004 *Final Environmental Impact Statement*. Citations to "ND Appx." are to the appendix North Dakota filed with the court below.

F.Supp.2d at 1129. Without question, "the upper basin states and . . . tribes have been short-changed in the management of the Missouri River." Beck, *supra*, at 490.

Though the promised irrigation never occurred, upstream states developed the reservoirs into recreation destinations. JA 07390; *North Dakota*, 270 F.Supp.2d at 1129. The primary attraction is fishing. JA 07392. The reservoirs are world class sport fisheries. *North Dakota*, 270 F.Supp.2d at 1129; JA 07363. Anglers in turn support businesses near and on the road to the reservoirs. JA 07390.

The economic value provided by Missouri River recreation is significant, even though it has yet to fully develop. The Corps sets the river's annual recreation value at $87 million. JA 07198. South Dakota sets the annual value of its Missouri River fishery at $51 milion. *North Dakota*, 270 F. Supp. 2d at 1130. North Dakota calculates the annual value of Lake Sakakawea's fishery to be at least $23 million. *Id.* at 1129; JA 00133-35 (Schultz Aff.). Low elevations can cost the states millions of dollars a year. *Id.* at 00134-35. Upstream facilities have other important purposes. For example, the dams produce hydropower worth $674 million a year. JA 07195-96. Hydropower generating capacity depends on water elevations in the reservoirs, that is, the "head." JA 07385. As the elevation declines the head decreases, dropping generating capacity proportionally. *Id.* The more water retained in the reservoirs, the better able the Corps can satisfy the Flood Control Act's hydropower objectives. *See, e.g.*, JA 05081 (NAS Study); JA 00033 (GAO Report).

The lower basin's attempt to develop a viable downstream navigation industry has failed. Despite the fact that years ago the government built in the lower basin a navigation channel and continues to maintain it, navigation,

which requires "lavish amounts of water, [has] not developed into an enterprise of noticeable size or need." John H. Davidson & Thomas Earl Geu, *The Missouri River and Adaptive Management: Protecting Ecological Function and Legal Process*, 80 Neb. L. Rev. 816, 836 (2001). Maintaining a navigation channel costs the Corps about $7 million a year, *see* JA 07274, while the navigation industry has an annual value of only $9 million. JA 07195. Missouri River commerce delivers less than 1% of the river's economic benefits. *See* JA 07193-98, 07859. The $7 million it costs the public to maintain a navigation channel is near the diminishing industry's $9 million value. Indeed, the industry may have an annual value of only $1-2 million. Thorson, *supra*, at 125 n.13.

The industry is not only small, it has been declining for some time, "will continue to decline greatly, and is of little, if any, net economic value." *South Dakota v. Ubbelohde*, CIV No. 02-3011, Prelim. Inj. at 7-8 (D.S.D. May 14, 2002). Navigation tonnage peaked in 1977 at 3.3 million tons. JA 07408. Less than two million tons of commercial goods have been transported annually since 1988, and in 2002 and 2003 only 1.1 million tons were transported. JA 08701 (Master Manual). The Missouri, despite its volume of water, its length, and the money spent on it, carries much less commerce than many other rivers. JA 01351-52 (Stearns Report). For example, from 1940 to 1996 Mississippi River commerce rose from 30 million to 520 million tons. JA 07411.

A district court describes the economic value of downstream navigation as "rather meager." *South Dakota v. Ubbelohde*, CIV No. 02-3011, Prelim. Inj. at 7 (D.S.D. May 14, 2002). Commentators describe the industry as "moribund," "an experiment that has failed," and "the army's

bad joke." Brian Morris, *Unanswered Prayers: The Upper Missouri River Basin States Take on the U.S. Army Corps of Engineers*, 68 N.D. L. Rev. 897, 935 (1992); Davidson & Geu, *supra*, at 836; Lawson, *supra*, at 187. But under the ruling below, relying on an incorrect reading of the 1944 Act, the Missouri River is to be managed largely for a stagnant navigation industry, at the expense of other more valuable and widespread uses.

D. Litigation History

While the allure of trophy walleye drives upstream recreation, the walleye cannot survive without its primary food source, the rainbow smelt. The smelt spawn occurs each spring when the smelt lay their eggs near the surface. *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1021 (8th Cir. 2003). If the water recedes the eggs will die after a few minutes of exposure to the air. *Id.* A successful smelt spawn requires stable or rising water. In 2002 the Corps threatened to destroy the smelt and sacrifice upstream fisheries by sending water downstream for navigation. If the smelt population crashed, the economic consequences would be devastating. JA 00135 (Schultz Aff.); *North Dakota*, 270 F.Supp.2d at 1130. The threat to the smelt triggered litigation. App. at 6.

To protect its spawn, South Dakota obtained an injunction prohibiting the Corps from drawing down South Dakota reservoirs. *Id.* In response, the Corps intended to draw down North Dakota's Lake Sakakawea and Montana's Ft. Peck Reservoir. To protect their fisheries, these two states obtained injunctions. *Id.* A successful smelt spawn, however, is not the Dakotas only concern. "Water levels are a key factor in use of the lakes . . . At low lake

levels, some boat ramps are unusable. . . . For aesthetic reasons, some visitors are less likely to frequent lakes . . . Certain kinds of fishing and hunting are dependent upon lake levels." JA 07390.[4]

After the upstream states sued, Nebraska filed an action in the District of Nebraska. The State of Missouri intervened. The Nebraska District Court ordered the Corps to comply with its 1979 Missouri River Master Manual. App. at 6. Faced with several injunctions, the Corps appealed.

In 2003 and while the appeal was pending, Montana dismissed its suit but new suits were filed. Private downstream interests, led by Blaske Marine, Inc., sued federal agencies and the upper basin states. *See* App. at 36, 59-60, 65-68, 75-87. Among their claims were challenges to walleye stocking programs in the upper basin and agency decisions under the Endangered Species Act ("ESA"), NEPA, and the 1944 Flood Control Act. North Dakota brought a second suit. Lake Sakakawea's draw down

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[4] Low water has interrupted drinking water supplies. In November of 2003 North Dakota communities on Lake Oahe lost their water. About 10,000 Sioux County residents and the towns of Fort Yates, Cannon Ball, and Porcupine were affected. M. Albrecht, Reserve Supplies Are Running Dry, Bismarck Trib. 1A (Nov. 26, 2003). *See also* JA 08430 (Tribal Stmt.) In 2003 a week-long dredging project protected the city of Mandan's intake. L. Donovan, Mandan Water In Jeopardy, Bismarck Trib. 1A (Sept. 24, 2003); R. Hinton, Dredging Should Be Finished Next Week, Bismarck Trib. 1 (Sept. 30, 2003). The small town of Garrison spent $400,000 to secure its Lake Sakakawea water supply. L. Donovan, Garrison's Water Supply Secure For Now, Bismarck Trib. 1B (Jan. 9, 2005). South Dakota's Cheyenne River Sioux Tribe's water intakes are threatened by low reservoir levels. JA 08397. The Corps states that more water supply disruptions can be expected if water levels decline further, "particularly" in the upper basin. ND Appx. at 28 (2004-05 AOP). *See also* JA 08409 (Tribal Stmt.).

removed so much water that the lake's cold water habitat – on which the walleye as well as the salmon depend – was in jeopardy. As the lake dwindles, the temperature of deeper water rises to a point that threatens the cold water habitat and risks violating water quality standards adopted by North Dakota under the federal Clean Water Act. *E.g.*, JA 07665-66; ND Appx. at 26 (2004-05 AOP). North Dakota asserted that high releases from Lake Sakakawea violated the state's water quality standards. The district court ultimately dismissed North Dakota's suit. *North Dakota v. United States Army Corps of Engineers*, 320 F.Supp.2d 873 (D. Minn. 2004). The Eighth Circuit affirmed. 418 F.3d 915. North Dakota intends to file a petition for certiorari in that case. Also in 2003 environmental groups, led by American Rivers, filed suit in the District of Columbia, asserting that the government violated the ESA by failing to protect three species that need Missouri River habitat for survival – the pallid sturgeon, the piping plover, and the least tern. App. at 10-11.

Thus, seven suits were filed in five different districts over the Corps' river management – the South Dakota, North Dakota, Nebraska/Missouri, and Montana suits in 2002, and the 2003 Blaske Marine, North Dakota, and American Rivers suits.[6] Additional parties intervened in some of the suits. For example, the Mandan, Hidatsa, and Arikara Nation – a North Dakota Indian tribe – intervened, as did the Missouri River Energy Services – a coalition of Midwestern cities owning electric utilities. The Nebraska Public Power District became a litigant.

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[6] In the litigation below, federal jurisdiction was founded on 28 U.S.C. § 1331.

In the summer of 2003 the litigation was consolidated in the District of Minnesota. App. at 11. Also that summer, the Eighth Circuit issued a decision on the Corps' appeal of the 2002 injunctions. *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003). Relying primarily on *ETSI Pipeline*, the court ruled that while the 1944 Flood Control Act requires the Corps to balance all uses, it gives navigation a priority. *Id.* at 1019-20.

North Dakota and South Dakota filed a petition for certiorari. The federal government opposed the petition. *North Dakota v. Ubbelohde*, No. 03-935, Brief of the Federal Respondents in Opposition (Mar. 2004). It argued that the Dakotas misread *Ubbelohde*. *Id.* at 13-15. It asserted that the court of appeals had not interpreted the 1944 Flood Control Act to give navigation a priority. *Id.* at 14. The government also argued that the decision was interlocutory. *Ubbelohde* reviewed injunctions and "did not render a final judgment on the merits." *Id.* at 16. The government next argued that the Corps would soon issue a revised Master Manual that would likely make "important changes" in the Corps' river management. *Id.* at 17. Missouri, Nebraska, and a downstream organization, MO-ARK Association, also opposed the petition. The petition was denied. 541 U.S. 987 (2004).

While the petition was pending litigation continued in the lower courts. Summary judgment motions were filed with the district court in Minnesota. It issued its decision in June of 2004. App. at 89. (Earlier, it had ordered the Corps to issue a new Missouri River Master Manual, which the Corps did in March of 2004. App. at 35 n.1.) The district court agreed that the Flood Control Act does not set priorities. "The Missouri River cannot be operated in a vacuum, but rather the Corps must consider, evaluate, and

balance all interests in its operation of the Missouri River." App. at 88. The "'Pick' Plan did not rank any river interests above another," and the "'Sloan' Plan does not dictate a priority of river interests." App. at 40. Further, it ruled that the Flood Control Act itself "does not require a particular outcome, but rather . . . [a]ll river interests must be considered and evaluated to 'secure the maximum benefits' to river interests." App. at 41. The Corps is not obligated to maintain any minimum water levels or seasons for navigation. App. at 41-42. On appeal, however, the Eighth Circuit gave downstream navigation a priority, describing it as a "dominant function." *Ubbelohde*, 330 F. 3d at 1019-20.

The litigation that began in 2002 was only the most recent round. In 1990 the Upper Basin States sued the Corps. *South Dakota v. Hazen*, 914 F.2d 147 (8th Cir. 1990). They sued again in 1991. JA 00267 (*South Dakota v. Bornhoft*). Missouri and the MO-ARK Association sued the Corps in 1997. *Missouri v. Craig*, 978 F.Supp. 902 (W.D. Mo. 1997), *vacated*, 163 F.3d 482 (8th Cir. 1998). Missouri had also sued in 1992. *Id.* at 906 (*Missouri v. Bornhoft*). In 1999 a tribe sued over the effects of fluctuating waters on grave sites. *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 194 F.Supp.2d 977, 983 (D.S.D. 2002). Litigation over the Corps' management and the Flood Control Act's proper interpretation has been protracted and requires resolution by this Court.

REASONS FOR GRANTING THE PETITION

A. Introduction

The Court should grant certiorari for two reasons. One, the court below, in ruling that navigation is a "dominant function" rewrote the 1944 Flood Control Act. In doing so it improperly relied on misleading dictum in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988), a case in which competing water uses were not at issue. Given the variety and importance of uses to which the Missouri is put – municipal drinking water, commercial navigation, recreation, farmland irrigation, industrial water supply, and power generation – it is essential that the Court clarify and confirm Congress' direction for water allocations among the basin states. They and their citizens are entitled to have the erroneous dictum in *ETSI Pipeline* corrected so that the Corps can properly manage the river. Two, the Court should grant certiorari because the court below ignored the United States' understanding of the Act. The United States, through its Corps of Engineers – which has considerable experience managing the river – has concluded that the Act requires an equitable balancing of all uses. That fair, eminently sensible interpretation is undermined by the court below and its misreading of the Act.

At its heart, this matter is about allocating the Missouri River among seven states. Errors by the court below give the lower basin's barge industry an inordinate amount of the river's water. This Court's authority is needed to interpret the statute at the source of the long-standing dispute over one of America's premier resources.

B. The court of appeals misread the Flood Control Act

1. The 1944 Flood Control Act. The Act can be readily reviewed to assess whether it sets priorities. Its relevant provisions are not lengthy. App. at 90-112. Nowhere in the Act does it relegate recreation or hydropower or any other use to secondary status. Nowhere in the Act does the phrase "dominant function" appear. Nowhere does Congress state that navigation has priority over other uses. If it imposes any restriction, it restricts navigation. Navigation works are to be "operated consistently" with the "economic use of the waters . . . by other users." App. at 90. The ruling below does not implement this requirement. It does the opposite, allowing the river to be operated inconsistently with other interests.

Further, the Act incorporates the Joint Report. App. at 97. The Joint Report states that developing the basin under the two plans "will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." App. at 109. The Report does not set priorities. Uses are not divided into first class and second class, primary and secondary. There is no hierarchy. As the United States asserts in the brief it filed with the court below: "The text of the [Act] nowhere gives priority to navigation over other uses." Brief of Federal Defendants-Appellees at 36 (Feb. 2005). The district court agreed, finding that the Act "does not require a particular outcome," but rather that the "maximum benefits" for all river interests must be secured. App. at 41. The Corps is not obligated to maintain "minimum navigation flows or season lengths." App. at 41.

Independent entities do not find a navigation priority in the Act. The Government Accounting Service did not find one, JA 00041 (GAO 2000 Report), nor did the Congressional Research Service. JA 00002-03 (CRS 1992 Report). A Department of the Interior Regional Solicitor concluded that the Act and its legislative history "lend no support" for a navigation priority. JA 02198 (1992 Letter). *See also* JA 05097 (NAS).

2. The *Ubbelohde* decision. The court below stated that it did not need to consider arguments about the Act because it had considered the statute in its 2003 *Ubbelohde* decision. "In *Ubbelohde*, we relied on the Supreme Court's decision in *ETSI Pipeline* . . . and the legislative history . . . to determine that '[t]he dominant functions of the Flood Control Act were to avoid flooding and to maintain downstream navigation.'" App. at 15.

The analysis in *Ubbelohde* – upon which allocating Missouri River water now rests – is but one paragraph. 330 F.3d at 1019-20. The first two sentences state: "The Act also laid out certain substantive interests that it was to serve. The dominant functions of the Flood Control Act were to avoid flooding and to maintain downstream navigation. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988)." *Id.* There was, however, no analysis of *ETSI* and its dictum. There was no effort to separate *ETSI's* jurisdictional dispute between two agencies from the present and more fundamental question about allocating the Missouri. *Ubbelohde* then discussed legislative history, but the discussion does not support *ETSI's* dictum.

> The Act's dominant functions were expressed repeatedly in three Congressional Documents: Senate Documents 191 [the Sloan Plan] and 247

> [the Joint Report] and House Document 475 [the Pick Plan]. See Flood Control Act Section 9, 58 Stat. at 891. House Document 475, which represented one of two competing plans, confirmed this view, stressing flood control. H.R. Doc. No. 475, 78th Cong., 2d Sess. 28-29 (1944). At the same time, however, the Act recognizes secondary uses of the River including irrigation, recreation, fish, and wildlife. See Flood Control Act Section 4, 58 Stat. at 889-90; 33 U.S.C. § 708 [Sec. 6 of the Act]; 43 U.S.C. § 390 [Sec. 8 of the Act]. The House Document just cited noted that the management plan "would also provide for the most efficient utilization of waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." H.R. Doc. No. 475, supra, at 29. Senate Document 247, which reconciled the competing proposals, included a discussion of the purposes of Lake Oahe: "the irrigation of 750,000 acres of land . . . as well as to provide useful storage for flood control, navigation, the development of hydroelectric power, and other purposes." S. Doc. No. 247, 78th Cong., 2d Sess. 3 (1944). Thus, the Flood Control Act provided the Corps with a wide array of interests to consider in regulating the River.

Id. The court's opening and conclusory citation to the Pick Plan, Sloan Plan, and Joint Report makes it impossible to know what the court relied on in these documents. And neither the Pick Plan nor the Joint Report use the term "dominant function" or anything like it. The court then follows with a reference to "flood control," which has no bearing on a navigation priority. It next refers to "irrigation, recreation, fish, and wildlife," labeling them "secondary" and citing several sections of the Act. None of the

sections, however, use the word "secondary" or anything like it. App. at 94-97. The court then cites the Pick Plan stating that its objective was to "'provide for the most efficient utilization of waters of the Missouri River Basin for all purposes, including . . . power . . . wildlife, and recreation.'" This supports equitably balancing all uses, not favoring one use. The court then cites the Joint Report for the proposition that Lake Oahe is to be managed for "flood control, navigation, the development of hydroelectric power, and other purposes." This doesn't present a hierarchy of uses. In fact, the Joint Report states that the river is to be managed to "secure the maximum benefits" for all uses. App. at 109.

3. The *ETSI* decision. The primary reason for the Eighth Circuit's finding that navigation has a priority is this Court's *ETSI Pipeline* decision. *ETSI* concerned a contract signed by the Secretary of the Interior allowing water withdrawals from Lake Oahe for a slurry pipeline to move coal from Wyoming to the southeastern United States. 484 U.S. at 497-98. Downstream states challenged the Secretary's contracting authority. The case was about a division of authority between the Corps and Interior. *Id.* at 499. *See also, id.* at 503 ("The crucial provisions here . . . were the sections [in the Act] that set forth the specific authority allotted to [the Departments of] War and Interior"). The Court stated that no issue is presented "as to the relative interests of the United States and South Dakota in Lake Oahe water." *Id.* at 498 n.2.

The Court ultimately ruled that the Secretary did not have authority to authorize the withdrawal. *Id.* at 513-17. Explicit language in the Flood Control Act supported this conclusion. Because the Act "speaks directly to the dispute . . . [t]hat is 'the end of the matter.'" *Id.* at 517 (citation

omitted). And that is where the Eighth Circuit should have left *ETSI*; as a decision addressing the contracting authority of federal agencies. *ETSI* should not be used to decide a different issue, that is, whether the Corps, in operating the river, must favor navigation.

While the "dominant function" language is in *ETSI*, 484 U.S. at 512, it was used in the context of discussing only the Sloan Plan. *Id.* The Court, however, also referred to the Pick Plan. It stated that while the Pick Plan stressed flood control, "its comprehensive list of projects 'would also provide for the most efficient utilization of the waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation.'" *Id.* at 500 (quoting the Pick Plan). The Eighth Circuit could have just as well selected this statement as the "rule" of *ETSI*, as this Court's interpretation of the Flood Control Act. But the Eighth Circuit arbitrarily ignored the comment about the Pick Plan and chose the Sloan Plan comment. It is on that unfounded selection that allocating the Missouri River rests. And the Act, of course, is not based on just the Sloan Plan; it is improper to rely on one plan and ignore the other. Congress approved both plans, as coordinated by the Joint Report. App. at 97. Assuming that a review of the legislative history is even proper, the Eighth Circuit erred by relying on *ETSI's* Sloan Plan comment and ignoring the Pick Plan reference. It further erred by not acknowledging that Congress "revised and coordinated" the two plans in the Joint Report. *Id.* As the United States told the court below:

> [The "dominant functions" remark] was made in the context of the Court's determination of whether operation of the Mainstem reservoirs

> came within the jurisdiction of the Corps or the Department of the Interior. . . . The Supreme Court did not address the issues in this case concerning the Corps' balancing of competing uses of water. Thus, the Court's statement of the 'dominant function' in *ETSI Pipeline* is not dispositive of how the Corps must operate the Mainstem System.

Brief of Federal Defendants-Appellees at 35, n.5 (Feb. 2005).

The Court should grant the petition for the same reason it granted certiorari and reversed prior dictum in a matter involving the 1928 Flood Control Act. 33 U.S.C. 702c. In *Central Green Co. v. United States*, 531 U.S. 425 (2001), the Court reconsidered dicta in *United States v. James*, 478 U.S. 597 (1986). In *James*, the Court interpreted a section of the 1928 Act limiting the government's liability for injuries caused by floodwater from federal facilities, but in doing so included in *James* "confusing dicta." *Central Green*, 531 U.S. at 430. The Court recognized that to correct the lower court's error, it needed to "resort to the text of the statute," rather than to dicta in *James*. *Id.* at 431. In reviewing and rejecting its earlier dictum, the Court revisited the statute's text – the same task the Dakotas ask that the Court undertake here – to correct a lower court's misreading of a flood control statute.

Also In *Central Green*, the Court ruled that "to characterize every drop of water that flows through that immense project as 'flood water' simply because flood control is among the purposes served by the project unnecessarily dilutes the language of the statute." *Id.* at 434. Similarly, the *ETSI* dictum and the Eighth Circuit's

rulings make navigation a priority even though such a status for navigation does not appear in the statute, effectively diluting the broad objectives Congress sought to promote. Once the *ETSI* dictum is corrected – as dictum was corrected in *Central Green* – it is apparent that Missouri River waters should be allocated on equity rather than an unfounded priority.

4. The legislative history. The Eighth Circuit also relied on legislative history. App. at 15. So too did *ETSI* in citing the Sloan and Pick Plans. But as explained, the text of the Flood Control Act does not set forth a priority. It is clear on that point. A search for Congressional intent in the legislative history would seem unnecessary. Indeed, this Court has "repeatedly held" that the authoritative statement is the statutory text, not legislative history or other extrinsic material. *Exxon Mobil Corp. v. Allapattah Servs.*, 125 S.Ct. 2611, 2626 (2005). Legislative history can be "murky, ambiguous, and contradictory." *Id.* But if the Act's legislative history – the Sloan and Pick Plans – is to be examined, that history does not focus on just navigation.

The Pick Plan, for example, describes the facilities as "multiple-purpose." H.R. Doc. No. 78-475 at 3, 4, 18, 26, 28, 30 (1944). In addition to flood-control, the plan is to provide for the most efficient use of Missouri River waters "for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." *Id.* at 28-29. *See also id.* at 16. In transmitting the plan to Congress, the Corps stated that the plan calls for the "distribution of appropriate benefits over the entire valley." *Id.* at 3. Benefits were to be "great and widespread." *Id.* at 18.

Flexibility is emphasized. "Due allowance must be made for any changed conditions." *Id.* at 3. Water use will be adjusted to meet the basin's "changing needs" and "new economic situations." *Id.* The plan is "flexible." *Id.* at 4. "[P]reference can be given to the functions which contribute most significantly to the welfare and livelihood of the people of various parts of the basin." *Id.* at 3. The court below would turn this on its head and require that the Corps feature navigation, the use that contributes the least to the basin.

The Sloan Plan contains similar statements. The Secretary of the Interior stated that his agency's plan contemplates using the waters "beneficially for multiple purposes [to stabilize] the agriculture and economy of this vast basin." S. Doc. No. 78-191 at 1 (1944). "Substantial and material benefits would accrue through recreational use of the waters and facilities proposed." *Id.* at 2. The Department of the Interior's Board of Review described the plan as "comprehensive," one that would further the "recreational use of waters [and] conservation of fish and wildlife," and as one that will "create exceptional opportunities for expanding the fish and wildlife programs." *Id.* at 10, 13. Significantly, the Sloan Plan, like the Pick Plan, could be modified as "changes in physical and economic conditions make necessary." *Id.* at 17. As the Bureau's Commissioner stated in a letter included in the Pick Plan, the river must be managed for "a wide variety of functions, including . . . navigation, irrigation . . . hydroelectric generation . . . fish and wildlife preservation and recreation," and that the reservoirs should be operated to obtain "the maximum benefits" for, among other things, fish, wildlife preservation, and recreation. H.R. Doc. 475, *supra* at 6-7.

In the brief it filed below, the United States accurately states:

> The legislative history simply does not provide a basis for giving downstream uses priority over upstream uses such as hydroelectric power generation, irrigation, recreation, and support of fish and wildlife. The legislative history merely shows that Congress intended that navigation be supported, a fact not in dispute.

Brief of Federal Defendants-Appellees at 38 (Feb. 2005). And as the district court found, the Pick Plan "did not rank any river interests above another," and the Sloan Plan "does not dictate a priority of river interests." App. at 40. In sum, if legislative history is to be used, it contains numerous passages promoting all interests; it refers to "multi-purpose" facilities, and a duty to achieve "maximum benefits" and meet "changing needs."

C. The United States' interpretation of the Flood Control Act

The Eighth Circuit's ruling that navigation is preferred differs from the United States' interpretation of the Act. The United States agrees with the Dakotas, often stating that the statute *does not* give navigation a priority. In its brief below, the United States described the priority argument as "extreme." Brief of Federal Defendants-Appellees at 32 (Feb. 2005). The "argument fails because . . . the Corps has the discretion to strike a balance among the interests recognized by the [Act]," a result of the Act's "plain language . . . and its legislative history." *Id.* at 28. In a brief filed with the Eighth Circuit in the *Ubbelohde* case, the United States stated: "There is no statement in the Act or . . . in *ETSI* that navigation is always entitled to a

priority over the needs of fish and wildlife." Consol. Reply Brief of Federal Defendants-Appellants at 10 (Sept. 2002). The legislative history does not identify purposes "as primary or secondary." *Id.* at 1. *See also id.* at 6, 8-9.

In early 1990's litigation the Department of Justice wrote North Dakota: "Congress did not assign a priority to these [project] purposes." ND Appx. at 54 (Disheroon Letter). This was confirmed by the Corps Chief of Operations; this view has "always been the [Corps'] official position." *Id.* at 66 (Elmore Stmt.) Another Corps official stated that the Corps must be flexible "'to meet changing conditions.'" *Id.* at 73 (Sveum Stmt.). *See also id.* at 72. The Department of Justice made the same point. Functions must be balanced and "the priorities to be afforded these project purposes may be revised to take into account and to accommodate changing environmental and economic needs and conditions." *Id.* at 54 (Disheroon Letter).

Thus, the United States has often expressed its agreement with the Dakotas that there is not a navigation priority. Its statements are considered and authoritative, and have been made by Corps officials and the Department of Justice. "[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron USA, Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 844 (1984). This rule was applied in *ETSI.* 484 U.S. at 516-17. The court below failed to consider the way in which the Corps interprets its governing statute. It ignored its agency-deference responsibility.

D. Summary

The court below cited its 2003 *Ubbelohde* decision for finding a navigation priority. *Ubbelohde* in turn relied on *ETSI*. But the Missouri River conflict is far too important to be settled on such an unsound source. Unfortunately, the court paid little attention to the Act itself. Had it, it would have found no priorities or hierarchy. It would have found that the Act incorporates the Joint Report, which instructs that the river be managed to "secure the maximum benefits" for all uses. App. at 109.

Certiorari is warranted because this case, at its heart, is an inter-state dispute over properly allocating water in a major river. While this dispute was not brought to the judiciary in a suit by one state against another, it is akin to the equitable apportionment cases the Court often hears under its original jurisdiction. *E.g., Texas v. New Mexico*, 462 U.S. 554 (1983); *Wyoming v. Colorado*, 298 U.S. 573 (1936). Controversies between states "present not infrequently questions of far-reaching import and of exceeding difficulty." *Kansas v. Colorado*, 206 U.S. 46, 80 (1907). This dispute involves the Corps' difficult mission to manage the river and presents issues of far-reaching import for the basin's states and tribes. The "state versus state" nature of the case should inform the Court's review of the petition.

Two decades ago the Court deemed the 1944 Flood Control Act worthy of its attention. In *ETSI*, the Court considered an inter-agency dispute over contracting authority. Today, a far more important Flood Control Act issue is presented – a dispute among states over allocating Missouri River waters.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 2005

421 F.3d 618

United States Court of Appeals,
For The Eighth Circuit

In re: Operation of the Missouri River System Litigation

American Rivers, Inc.; Environmental Defense; National Wildlife Federation; Iowa Wildlife Federation; Kansas Wildlife Federation; Montana Wildlife Federation; Nebraska Wildlife Federation; North Dakota Wildlife Federation; South Dakota Wildlife Federation; Izaak Walton League of America, Inc., Appellants,

v.

United States Army Corps of Engineers; Les Brownlee, Acting Secretary of the United States Army; United States Fish and Wildlife Service; Gale Norton, Secretary of the United States Department of Interior, Appellees. State of Nebraska; Nebraska Public Power District; State of Missouri; State of North Dakota; State of South Dakota; Blaske Marine, Inc.; the Mandan, Hidatsa and Arikara Nation; Conocophillips Company; Ergon Asphalt and Emulsions, Inc.; Magnolia Marine Transport Company; Midwest Terminal Warehouse Company, Inc.; Mo-ark Association; Missouri River Keepers; Missouri River Energy Services Appellees.

State of Nebraska, Appellant,

v.

United States Army Corps of Engineers; Les Brownlee, Acting Secretary of the United States Army; United States Fish and Wildlife Service; Gale A. Norton, Secretary of the United States Department of Interior, Appellees. American Rivers, Inc.; State of Missouri; State of North Dakota; State of South Dakota; Blaske Marine, Inc.; the Mandan, Hidatsa and Arikara Nation; Conocophillips Company; Ergon Asphalt and Emulsions, Inc.; Magnolia Marine Transport Company; Midwest Terminal Warehouse Company, Inc.; Mo-ark Association; Missouri River Keepers; Missouri River Energy Services, Appellees.

Nebraska Public Power District, Appellant,

v.

United States Army Corps of Engineers; Les Brownlee, Acting Secretary of the United States Army; United States Fish and Wildlife Service; Gale Norton, Secretary of the United States Department of Interior, Appellees. American Rivers, Inc.; State of Missouri; State of North Dakota; State of South Dakota; Blaske Marine, Inc.; the Mandan, Hidatsa and Arikara Nation; Conocophillips Company; Ergon Asphalt and Emulsions, Inc.; Magnolia Marine Transport Company; Midwest Terminal Warehouse Company, Inc.; Mo-ark Association; Missouri River Keepers; Missouri River Energy Services, Appellees.

State of Missouri, Appellant,

v.

United States Army Corps of Engineers; Les Brownlee, Acting Secretary of the United States Army; United States Fish and Wildlife Service; Gale Norton, Secretary of the United States Department of Interior, Appellees. American Rivers, Inc.; State of Nebraska; Nebraska Public Power District; State of North Dakota; State of South Dakota; Blaske Marine, Inc.; the Mandan, Hidatsa and Arikara Nation; Conocophillips Company; Ergon Asphalt and Emulsions, Inc.; Magnolia Marine Transport Company; Midwest Terminal Warehouse Company, Inc.; Mo-ark Association; Missouri River Keepers; Missouri River Energy Services, Appellees.

The Mandan, Hidatsa and Arikara Nation, Appellant,

v.

United States Army Corps of Engineers; Les Brownlee, Acting Secretary of the United States Army; United States Fish and Wildlife Service; Gale Norton, Secretary of the United States Department of Interior, Appellees. American Rivers, Inc.; Environmental Defense; National Wildlife Federation; Iowa Wildlife Federation; Kansas Wildlife Federation; Montana Wildlife Federation; Nebraska

Wildlife Federation; North Dakota Wildlife Federation; South Dakota Wildlife Federation; Izaak Walton League of America, Inc.; State of Nebraska; Nebraska Public Power District; State of Missouri; State of North Dakota; State of South Dakota; Blaske Marine, Inc.; Conocophillips Company; Ergon Asphalt and Emulsions, Inc.; Magnolia Marine Transport Company; Midwest Terminal Warehouse Company, Inc.; Mo-ark Association; Missouri River Keepers; Missouri River Energy Services, Appellees.

Blaske Marine, Inc.; Conocophillips Company; Ergon Asphalt and Emulsions, Inc.; Magnolia Marine Transport Company; Midwest Terminal Warehouse Company, Inc.; Mo-ark Association; Missouri River Keepers, Appellant,

v.

United States Army Corps of Engineers; Les Brownlee, Acting Secretary of the United States Army; United States Fish and Wildlife Service; Gale Norton, Secretary of the United States Department of Interior, Appellees.
American Rivers, Inc.; Environmental Defense; National Wildlife Federation; Iowa Wildlife Federation; Kansas Wildlife Federation; Montana Wildlife Federation; Nebraska Wildlife Federation; North Dakota Wildlife Federation; South Dakota Wildlife Federation; Izaak Walton League of America, Inc.; State of Missouri; State of North Dakota; State of South Dakota; the Mandan, Hidatsa and Arikara Nation; Missouri River Energy Services, Appellees.

Nos. 04-2737, 04-2774, 04-2785, 04-2794, 04-2878 and 04-2994.

Submitted: April 11, 2005.
Filed: Aug. 16, 2005.

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Before WOLLMAN, BEAM, and GRUENDER, Circuit Judges.

GRUENDER, Circuit Judge.

In these consolidated appeals, various parties challenge the operation of the Missouri River main stem reservoir system by the United States Army Corps of Engineers ("the Corps") and associated wildlife assessments produced by the United States Fish and Wildlife

Service ("FWS"). The district court[1] granted summary judgment to the Corps and FWS and their named individual officers (collectively "the Federal Defendants") on all claims. For the reasons stated below, we dismiss three claims as moot and affirm the judgment of the district court on all remaining claims.

I. BACKGROUND

The Missouri River originates in Montana and runs through North Dakota, South Dakota, Nebraska, Iowa, Kansas and Missouri before emptying into the Mississippi River. In its natural state, the river subjected the surrounding basin to extensive flooding every spring. With the Flood Control Act of 1944 ("FCA"), Congress authorized the construction of a dam and reservoir system on the upper river to control the flooding. In addition to flood control, the FCA envisioned that the reservoirs would provide water for local irrigation projects, steady release into the river during the summer months to support downstream navigation, hydroelectric power generation and lake recreation. The FCA delegated construction and management of the main stem reservoir system to the Corps.[2]

The current challenges to the Corps' operation of the system arise from two directions. First, a persistent drought

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[1] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

[2] The main stem dams and reservoirs are Fort Peck Dam (Fort Peck Lake) in Montana, Garrison Dam (Lake Sakakawea) in North Dakota, and Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), Fort Randall Dam (Lake Francis Case) and Gavins Point Dam (Lewis and Clark Lake) in South Dakota.

in the Missouri River basin has led to a recurring conflict between upstream and downstream water-use interests. In 2002, the Corps planned to release water from Lake Oahe into the river to maintain downstream navigation throughout the summer. South Dakota, fearing a negative impact on the seasonal fish spawn in Lake Oahe and concordantly on the reservoir's sport fishing industry, obtained an injunction in federal district court preventing the Corps from lowering any reservoir in South Dakota until after spawning season. When the Corps decided to lower Lake Sakakawea instead, North Dakota obtained a similar injunction. Not to be outdone, Montana obtained an injunction to prevent releases from Fort Peck Lake. In response, Nebraska obtained an injunction ordering the Corps to make the required releases to support navigation as called for by the Corps' Missouri River Main Stem Reservoir System Master Water Control Manual ("1979 Master Manual").

In a consolidated appeal of these injunctions, we ruled that the FCA vested the Corps with discretion to balance the competing water-use interests. *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1027 (8th Cir.2003). Because the FCA's legislative history and its interpretation by the Supreme Court "indicate [] that the Corps's primary concerns should be flood control and navigation," we upheld the Corps' decision to follow the 1979 Master Manual and draw down the reservoirs to support downstream navigation. *Id.* at 1032.

The second point of conflict has been that flood prevention and steady summer flows for downstream navigation disrupt the natural habitat of protected bird and fish species in the Missouri River ecosystem. In litigation initially separate from the *Ubbelohde* cases, environmental groups

have attempted to force the Corps to operate the system to produce more "natural" river flows to benefit the protected species. To understand the current stances of the parties in this litigation, it is necessary to review in some detail the Corps' previous attempts to accommodate competing interests while developing its operating procedures.

The Corps sets forth its general operational guidelines for the Missouri River reservoir system in a Master Manual and the operational details for each year in an Annual Operating Plan. The first Master Manual was published in 1960 and revised in 1973, 1975 and 1979. The year 1987 brought the onset of the first persistent drought in the region since the reservoir system had become fully operational. Because it found that the operational procedures in the 1979 Master Manual were not well-tailored to handle a persistent drought, the Corps began the revision process for what would become the 2004 Master Manual.

The operation of the reservoir system also brings the Corps within the provisions of the Endangered Species Act ("ESA"). Under the ESA, if a government agency concludes that a proposed action may "jeopardize the continued existence" of any protected species or adversely affect its critical habitat, the agency must prepare a Biological Assessment and consult with the FWS. ESA § 7, 16 U.S.C. § 1536. The FWS then issues a Biological Opinion ("BiOp") describing how the action will affect the species, based on the "best scientific and commercial data available." *Id.* at § 1536(a)(2). If the FWS concludes that the proposed action would cause jeopardy to an endangered or threatened species, the BiOp must include a Reasonable and Prudent Alternative which would allow the agency to implement the desired action while avoiding jeopardy to the species. *Id.* at § 1536(b)(3)(A). Finally, if it appears

incidental "take"[3] will occur even if the Reasonable and Prudent Alternative is implemented, the BiOp must include an Incidental Take Statement setting conditions under which the agency may proceed while avoiding liability for the incidental harm to the protected species. *Id.* at § 1536(b)(4).

The Corps followed the above process with three protected species in the Missouri River basin: the pallid sturgeon, a fish listed as endangered since 1990; the least tern, a migratory bird listed as endangered since 1985; and the piping plover, a migratory bird listed as threatened since 1985. The pallid sturgeon spends its entire life cycle in the Missouri and Mississippi Rivers and their tributaries, while the tern and plover both nest in the summer on sparsely vegetated sandbars along the rivers. In 2000, the FWS issued a Biological Opinion ("2000 BiOp") finding that the Corps' proposed operation of the reservoir system was likely to jeopardize the continued existence of the three species.

The FWS found that the harm to the species resulted from the alteration of the river's natural hydrograph.[4] Before the construction of the dams, the hydrograph had two prominent components: the "spring rise" and "summer low flow." The "spring rise" refers to extremely high flows in late spring resulting from the spring thaw. According to the 2000 BiOp, the spring rise provided a biological

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[3] The ESA prohibits "taking" of endangered species. "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA § 3(14), 16 U.S.C. § 1532(19).

[4] A river's "hydrograph" is the variation in water level at each point along its channel over the course of time.

spawning cue for the pallid sturgeon and enabled the river to capture protein-rich nutrients from the floodplain and from wetland habitat not connected to the river channel during other seasons. In concert with the summer low flow, the spring rise also provided seasonal connectivity to the off-channel wetland habitat, making calm, shallow pools available to the pallid sturgeon for spawning, nursery and feeding areas. Lower elements of the food chain also were forced to congregate in the remaining pools, providing easy summer feeding for the protected species. In addition, the spring rise scoured and flushed sandbars. When the now-sparsely-vegetated sandbars were exposed by the summer low flow, the resulting lack of cover for concealed predators allowed terns and plovers to nest there safely.

The Corps' operation of the reservoir system, generally capturing water in the upstream reservoirs to eliminate spring flooding and releasing water throughout the summer and fall as necessary to enable downstream navigation and restore reservoir capacity for the following spring, eliminated the spring rise and summer low flow from the hydrograph. The Reasonable and Prudent Alternative included with the 2000 BiOp ("2000 BiOp RPA") stated that "higher spring and lower or declining summer flows than now exist"[6] were "an integral component of the

[6] The 2000 BiOp presented data from Corps models showing that, with the reservoirs and channel improvements in place, the "natural hydrograph" today would be expected to produce a spring rise of 80 Kcfs (Kcfs = thousand cubic feet per second) and a summer low flow of 10 Kcfs at the Gavin's Point Dam, the final reservoir release point into the lower river. Under the 1979 Master Manual, flow at that point was typically maintained steadily between 30-35 Kcfs from March through November. The 2000 BiOp RPA called instead for a spring rise from Gavin's Point totaling 50-55 Kcfs to be implemented about once every

(Continued on following page)

measures to avoid jeopardy" to the three protected species. The 2000 BiOp RPA also mandated habitat restoration, a comprehensive species and habitat monitoring program, and an adaptive management framework to "implement, evaluate, and modify the components of the RPA in response to variable river conditions, species responses, and increasing knowledge base."

In an attempt to support downstream water-use interests despite the continuing drought in the basin, the Corps released a draft Annual Operating Plan for 2003 that did not incorporate the flow changes from the 2000 BiOp RPA. Environmental interest groups filed suit under the ESA in the United States District Court for the District of Columbia to enjoin operations under that plan. At the Corps' request, the FWS then issued a supplemental biological opinion ("the 2003 Supplemental BiOp") that ratified the Corps' plan to avoid the 2000 BiOp RPA flows for the period of May 1 through August 15, 2003, with the understanding that operations after 2003 would be consistent with the 2000 BiOp. Before the district court, however, the Corps revealed that it had no intention of ensuring that its future operations would so comply. *Am. Rivers v. United States Army Corps of Eng'rs*, 271 F.Supp.2d 230, 253 (D.D.C.2003). In addition, the district court held that it was improper for the FWS to focus on the effects that the proposed action would have on the protected species during 2003 only, rather than on all future effects of the proposed action, and that the 2003

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three years, and an annual summer low flow of 25 Kcfs, ramped down to 21 Kcfs from mid-July through mid-August. The flow required for minimum support of downstream navigation is about 28.5 Kcfs, depending upon the accompanying inflow from downstream tributaries.

Supplemental BiOp failed to articulate a reasonable explanation for its departure from the analysis in the 2000 BiOp. *Id.* at 254-57. Therefore, the district court granted the injunction and ordered the Corps to comply with the summer low flow provisions of the 2000 BiOp. *Id.* at 263. Citing a conflict with this Court's *Ubbelohde* holding that required operation consistent with the 1979 Master Manual, the Corps initially failed to comply with the injunction and was held in conditional contempt. *See Am. Rivers v. United States Army Corps of Eng'rs*, 274 F.Supp.2d 62 (D.D.C.2003). Two days later, the Federal Judicial Panel on Multi-District Litigation consolidated all litigation regarding the operation of the Missouri River main stem reservoir system, including new suits by the parties involved in *Ubbelohde*, in the District of Minnesota ("MDL court"). On the order of that court, the Corps complied with the summer low flow provisions of the 2000 BiOp RPA for the brief remainder of the 2003 summer period.

At that point, the Corps prepared a new Biological Assessment with the goal of finding a way to avoid jeopardy to the protected species without following the 2000 BiOp RPA flow requirements. In the fall of 2003, the Corps presented the new Biological Assessment to the FWS and requested a new Biological Opinion. In response, the FWS issued an Amendment to the 2000 BiOp ("the 2003 Amended BiOp"). The 2003 Amended BiOp RPA permitted the Corps to avoid the summer low flow requirement on the condition that it construct 1,200 additional acres of shallow water habitat for the pallid sturgeon. In addition, it gave the Corps two more years to experiment with alternatives to a spring rise. If the Corps could not produce an acceptable alternative plan, the RPA imposed a

default spring rise of reduced magnitude beginning in the spring of 2006.

The Corps continued to develop the 2004 Master Manual by complying with the provisions of the National Environmental Policy Act ("NEPA"). *See* 42 U.S.C. §§ 4321 *et seq.* NEPA requires the preparation of a detailed Environmental Impact Statement ("EIS") for every major federal action that will significantly affect the quality of the environment. 42 U.S.C. § 4332(C). The EIS must also evaluate alternatives to the proposed action. *Id.* In this case, the Corps compared five potential water control plans in its EIS before adopting the Preferred Alternative, a plan consistent with the 2003 Amended BiOp, as the basis for the 2004 Master Manual. The MDL court truncated the NEPA public-comment-and-review period and ordered all plaintiffs in this litigation to amend their complaints to address the 2004 Master Manual and 2004 Annual Operating Plan.

After the issuance of the 2004 Master Manual and 2004 Annual Operating Plan, various parties filed motions for summary judgment. The district court granted summary judgment to the Federal Defendants on all claims on the bases that (1) the FCA does not create a non-discretionary duty in the Corps to maintain minimum navigation flows or a minimum length for the navigation season, and (2) the discretionary decisions made by the Federal Defendants in balancing water-use interests under the FCA and in avoiding jeopardy to the protected species were not arbitrary and capricious.

The parties now make various arguments on appeal. The states of Missouri and Nebraska and the Nebraska Public Power District ("NPPD") argue that the 2004

Master Manual violates a non-discretionary duty of the Corps under the FCA to maintain river flow sufficient to support uninterrupted downstream navigation throughout the navigation season. Nebraska and NPPD also argue that the 2003 Amended BiOp is in conflict with the purported FCA minimum-flow requirement, while Missouri argues that the 2003 Amended BiOp violates the ESA because it will eliminate some pallid sturgeon habitat in the lower Missouri River. American Rivers, the National Wildlife Federation, several state Wildlife Federations and the Izaak Walton League of America (collectively "American Rivers") argue that the 2003 Amended BiOp is arbitrary and capricious because it does not insure against jeopardy to the three protected species. In addition, American Rivers contends that the EIS was faulty because the Corps failed to explain why the Preferred Alternative was superior to another evaluated alternative. Blaske Marine, ConocoPhillips Company, Ergon Asphalt & Emulsions, Inc., Magnolia Marine Transport Company, Midwest Terminal Warehouse Company, Inc., MO-ARK Association and Missouri River Keepers (collectively "Blaske Marine") argue that a supplemental EIS is required for a contingent summer low flow that the Corps still has the discretion to implement. Finally, the Mandan, Hidasta and Arikara Nation ("the Nation") contends that the Corps must operate Lake Sakakawea (Garrison Dam) for the economic benefit of the Nation's members.

II. DISCUSSION

"We review de novo a grant of summary judgment, applying the same legal standards used by the district court." *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir.2004). We review the actions of the Corps and

FWS under the Administrative Procedure Act "to determine whether they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[6] *Ubbelohde*, 330 F.3d at 1027 (quoting 5 U.S.C. § 706(2)(A)). An arbitrary and capricious action is one in which:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Cent. S.D. Coop. Grazing Dist. v. Sec'y of the United States Dep't. of Agric., 266 F.3d 889, 894 (8th Cir.2001) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). "If an agency's determination is supportable on any rational basis, we must uphold it." *Voyageurs Nat'l Park Ass'n*, 381 F.3d at 763. "When the resolution of the dispute involves primarily issues of fact and analysis of the relevant information 'requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.'" *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir.1999) (quoting *Marsh v. Oregon Natural Resources*

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[6] Nebraska and NPPD argue that the Corps has attempted to evade judicial review under the Administrative Procedure Act by stating in a letter that it did not intend for the 2004 Master Manual to be considered a binding regulation. We established in *Ubbelohde* that the 1979 Master Manual was binding and subject to judicial review. 330 F.3d at 1027-30. The Corps has conceded, both in district court and in its briefs on appeal, that the 2004 Master Manual is still binding on the Corps and subject to judicial review.

Council, 490 U.S. 360, 377, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989)).

A. The Corps' FCA Duty to Support Downstream Navigation

Missouri, Nebraska and NPPD (collectively "the downstream parties") argue that the 2004 Master Manual is not in accordance with law because, under certain drought conditions, it calls for canceling the navigation season in order to hold water in the reservoirs for the benefit of recreation. The MDL court concluded that the FCA imposes no duty to maintain a minimum level of downstream navigation independent of consideration of other interests. We agree.

This Court has already addressed thoroughly the balance of interests under the FCA. In *Ubbelohde*, we relied on the Supreme Court's decision in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988), and the legislative history of the FCA to determine that "[t]he dominant functions of the Flood Control Act were to avoid flooding and to maintain downstream navigation," while "the Act recognizes secondary uses of the River including irrigation, recreation, fish, and wildlife." *Ubbelohde*, 330 F.3d at 1019-20. However, the FCA does not set forth what level of river flow or length of navigation season is required to make navigation "dominant" over a "secondary" interest such as recreation. Instead, "the courts can review the Corps's decisions to ensure that it considered each of these interests before making a decision," but "the Act does not provide . . . a method of deciding whether the balance actually struck by the Corps in a given case is correct or not." *Id.* at 1027.

The downstream parties challenge the provisions of the 2004 Master Manual referred to as "navigation precludes." The amount of water stored in the entire reservoir system is checked on March 15 and July 1 of each year. If total system storage falls below the "volumes . . . that allow the System to function to meet authorized purposes during significant multi-year drought periods," navigation support is reduced or eliminated for that year. 2004 Master Manual § 7-03. The EIS estimates, based on the modeling of historical data from 1898 to 1997, that the selected navigation-preclude volumes will lead to the elimination of the entire navigation season only in the four worst drought years out of every one hundred years, and to a navigation season shortened from eight-plus months to less than seven months only in the eight worst drought years out of every one hundred. Under these circumstances, we cannot say that the Corps failed to consider downstream navigation before making its decision.[7]

Appellees North Dakota and South Dakota argue that because damage to the recreation industry would have a

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[7] The Corps states in § 7-01 of the 2004 Master Manual that in the FCA, "Congress did not assign a priority to these purposes" of "flood control, navigation, irrigation, hydropower, . . . recreation, and fish and wildlife. . . ." To the contrary, as we clearly stated in *Ubbelohde*, the FCA has been interpreted to hold flood control and navigation dominant and recreation, fish and wildlife secondary. *Ubbelohde*, 330 F.3d at 1019-20. If, due to extreme conditions, the Corps is faced in the future with the unhappy choice of abandoning flood control or navigation on the one hand or recreation, fish and wildlife on the other, the priorities established by the FCA would forbid the abandonment of flood control or navigation. While we hold today that the 2004 Master Manual does not "abandon" navigation, we do not rule out the possibility that some more limited degree of support for flood control or navigation in the future could be held to constitute "abandonment" of these dominant functions. *See also infra* note 9.

more dramatic negative economic impact than would damage to the navigation industry, recreation should receive special priority. Nothing in the text or legislative history of the FCA suggests that Congress intended the priority of interests under the FCA to shift according to their relative economic value. Arguments based on the wisdom of the priorities established by the FCA must be addressed to Congress.[8]

The Corps' balancing of water-use interests in the 2004 Master Manual is in accordance with the FCA. Because the 2004 Master Manual does not evidence a failure to consider the support of downstream navigation, it is not arbitrary and capricious. Therefore, we affirm the grant of summary judgment to the Corps on this claim.

B. The Corps' Duty to Consult with the FWS under ESA § 7

Nebraska and NPPD argue that it was not in accordance with law for the Corps to engage in the ESA § 7 consultation process with the FWS regarding the operation of the reservoir system. They contend that the ESA

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[8] Appellee South Dakota also argues that the O'Mahoney-Millikin Amendment, 33 U.S.C. § 701-1(b), prioritizes the retention of water in the reservoirs over downstream navigation. The MDL court granted summary judgment against South Dakota on this issue, and South Dakota did not appeal. We, therefore, construe South Dakota's argument in opposition to the appellant downstream parties to be that the O'Mahoney-Millikin Amendment would forbid, for the purposes of supporting navigation, any further lowering of the navigation-preclude volumes beyond those implemented in the 2004 Master Manual. Because we find against the appellant downstream parties on this issue on other grounds, we need not address appellee South Dakota's argument.

does not apply to the operation of the reservoir system because ESA compliance would interfere with downstream navigation, a project purpose that is mandated by statute such that the Corps has no discretion in meeting it. *See* 50 C.F.R. § 402.03 ("Section 7 [of the ESA] and the requirements of this part apply to all actions in which there is *discretionary* Federal involvement or control.") (emphasis added).

Case law supports the contention that environmental – and wildlife-protection statutes do not apply where they would render an agency unable to fulfill a non-discretionary statutory purpose or require it to exceed its statutory authority. For example, in *National Wildlife Federation v. United States Army Corps of Engineers*, 384 F.3d 1163 (9th Cir.2004), the Ninth Circuit held that the Corps' operation of four dams on the Snake River did not violate the Clean Water Act. The challenged noncompliance with water standards was caused by "the existence of the dams and not any discretionary method of operating the dams," and the Clean Water Act could not be construed to supersede "the Corps's operation of the dams consistent with the purposes stated by Congress." *Id.* at 1178-79.

Similarly, in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (D.C.Cir.1992), the Federal Energy Regulatory Commission (FERC) was authorized by statute to issue annual licenses to hydropower providers on the Platte River. The enabling statute forbade alteration of the terms of an annual license without agreement from the licensee. Environmental groups sued FERC, arguing that the ESA required the imposition of wildlife-protection terms in the licenses. The court held that the ESA did not apply to the licenses because the ESA did not authorize FERC to override the statutory prohibition

on altering the licenses. *Id.* at 32-34. In effect, *Platte River Whooping Crane* affirmed that the ESA does not apply where an agency has no statutory authority to act with discretion.

Cases such as *National Wildlife Federation* and *Platte River Whooping Crane* are inapposite to the instant case, however, because compliance with the ESA does not prevent the Corps from meeting its statutory duty under the FCA to support downstream navigation. As we stated above, the FCA does not mandate a particular level of river flow or length of navigation season, but rather allows the Corps to decide how best to support the primary interest of navigation in balance with other interests. The 2004 Master Manual demonstrates that the Corps can comply with the elements of the 2003 Amended BiOp RPA while continuing to operate the dams "consistent with the purposes stated by Congress" in the FCA.[9] *Nat'l Wildlife Fed'n*, 384 F.3d at 1179.

Because the Corps is able to exercise its discretion in determining how best to fulfill the purposes of the reservoir system's enabling statute, the operation of the reservoir system is subject to the requirements of the ESA. It was therefore in accordance with law for the Corps to consult with the FWS to produce the 2003 Amended BiOp. We affirm the grant of summary judgment to the Federal Defendants on this claim.

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[9] It follows that if future circumstances should arise in which ESA compliance would force the Corps to abandon the dominant FCA purposes of flood control or downstream navigation, the ESA would not apply. *See supra* note 7.

C. Mootness of Claims Based on Summer Low Flow

Several of the claims against the Federal Defendants challenge the conditional summer low flow element of the 2003 Amended BiOp RPA. The Federal Defendants argue that these claims are now moot because the Corps has successfully completed the mechanical construction of 1,200 acres of shallow water habitat, which permits the Corps to avoid the summer low flow requirement.[10] The Corps has announced that it has no plans to implement summer low flows in the foreseeable future. Missouri, NPPD and Blaske Marine counter that because the Corps retains the discretion to implement the summer low flow in any given year under its adaptive management framework, these claims fall within the "capable of repetition, yet evading review" exception to mootness. *Ubbelohde*, 330 F.3d at 1023 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975)).

We conclude that the claims based on summer low flow are moot. The "capable of repetition, yet evading review" exception "applies when two conditions are met: '(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.'" *Id.* (quoting *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998)).

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[10] American Rivers has challenged the successful completion of the 1,200 acres in the MDL court. The MDL court dismissed the suit without prejudice for procedural reasons. That dismissal has been separately appealed to this Court, Docket No. 05-1200, and is still pending.

In this case, it appears that the 30-day duration of a summer low flow period, particularly if it is implemented with little prior warning, is too short to be fully litigated prior to expiration. However, there is no reasonable expectation that the Corps will implement the 2003 Amended BiOp summer low flow in the future. Although a "'party need not show with certainty that the situation will recur,'" a "speculative possibility is not a basis for retaining jurisdiction over a moot case." *McCarthy v. Ozark Sch. Dist.*, 359 F.3d 1029, 1036 (8th Cir.2004) (quoting *Van Bergen v. Minnesota*, 59 F.3d 1541, 1547 (8th Cir.1995)). We are aware that the 2003 Amended BiOp requires the Corps to be ready to implement summer low flows as low as 21 Kcfs in the future if monitoring reveals that the alternate measures are not benefitting the protected species as expected. Nevertheless, as we discuss later in this opinion, at this point there is no reason to doubt the utility of those alternate measures. Therefore, "we find nothing to suggest a likelihood" that the Corps will decide to implement a summer low flow in future years. *McCarthy*, 359 F.3d at 1036.

Because there is no reasonable expectation at this point in time that the Corps will implement the 2003 Amended BiOp summer low flow in the future, we conclude that the following claims are moot: (1) NPPD's claim that the FWS failed to consider the economic feasibility of the summer low flow requirement in developing the 2003 Amended BiOp; (2) Missouri's claim that the loss of shallow water habitat for larval and juvenile pallid sturgeon in central Missouri state resulting from summer low flow constitutes an impermissible "take" of the sturgeon under ESA § 9; and (3) Blaske Marine's NEPA claim that a supplemental EIS is required for the 2003 Amended BiOp

summer low-flow requirement. We vacate the MDL court's grant of summary judgment to the Federal Defendants on these claims and instruct the MDL court to dismiss these claims without prejudice.

D. The Validity of the 2003 Amended BiOp

NPPD argues that the 2003 Amended BiOp is invalid because the FWS violated regulations applicable to Biological Opinions. American Rivers challenges the 2003 Amended BiOp on the grounds that the 2003 Amended BiOp RPA contradicts its own factual findings and the administrative record and does not insure against jeopardy to the protected species.

1. The Environmental Baseline for the 2003 Amended BiOp

NPPD contends that the FWS used an improper environmental baseline in producing the 2003 Amended BiOp. "The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area. . . ." 50 C.F.R. § 402.02. Jeopardy to the protected species resulting from the proposed action is measured relative to the species' status under the baseline. *Id.* The FWS used a "run-of-the-river" baseline in which the dams and physical channel modifications are assumed to be in place, but all floodgates are assumed to be wide open, with no flow control. NPPD argues that normal operation under the 1979 Master Manual was the proper baseline because it is a "past impact" of a separate federal action and would continue to control operations absent the proposed action. Because continued operation under the 1979 Master

Manual would cause the protected species' chances of recovery to deteriorate, its inclusion in the baseline would tend to eliminate a finding of jeopardy for any proposed action.

According due deference to the FWS' interpretation of its own regulations, *Friends of the Boundary Waters Wilderness*, 164 F.3d at 1121, we agree with the FWS that hypothetical continued operation under the previous version of the Master Manual in future years, as the alternative to the proposed action of updating the Master Manual, does not in any sense constitute a "past impact" of federal action. As the district court recognized, this argument is essentially a different twist on the argument that the Corps has no discretion in operating the reservoir system. If the FCA mandated that the Corps must manage the system to enable, for example, a barge of specific size riding a specific depth below the waterline to navigate the river between Sioux City and the Mississippi River at all times between April 1 and December 1, there would be some merit to including that non-discretionary condition in the environmental baseline along with the permanent physical presence of the dams and channel modifications. However, given that the FCA "clearly gives a good deal of discretion to the Corps in the management of the River," *Ubbelohde*, 330 F.3d at 1027, we cannot say that it was arbitrary and capricious for the FWS not to include a specific operational profile in the environmental baseline. Therefore, we affirm the grant of summary judgment to the Federal Defendants on this claim.

2. Use of the Best Scientific and Commercial Data Available

NPPD argues that the FWS did not rely on the best scientific data available in its efforts to create a "normalized" hydrograph in the 2003 Amended BiOp RPA. "In formulating its biological opinion, [and] any reasonable and prudent alternatives . . . the [FWS] will use the best scientific and commercial data available." 50 C.F.R. § 402.14(g)(8); *see* 16 U.S.C. § 1536(a)(2).

To create a normalized version of the summer low flow portion of the natural hydrograph, the 2003 Amended BiOp calls for low flows beginning in July. NPPD directs our attention to a United States Geological Survey report in the administrative record showing that, before construction of the dams, the lowest summer flows usually occurred between August and early October. NPPD contends that this incongruity evidences a failure to use the best scientific data available to formulate the 2003 Amended BiOp.

The administrative record as a whole shows that the FWS did not ignore the best scientific data on the summer low flow in formulating the 2003 Amended BiOp. For example, in a document e-mailed by the FWS to new members of the 2003 Amended BiOp development team in November 2003, the FWS recognized that "[t]he historic hydrograph began to fall at Gavins Point in mid-June and reached it's [sic] lowest levels in the fall months," but indicated that the FWS proposal would end the low flow period in August because higher releases in the fall were necessary "to evacuate any excess water [from the reservoirs] prior to the next water year." The FWS then stated that, "[w]hile this approach is not a perfect fit to the historic hydrograph, we believe that it sufficiently mimics

. . . the natural hydrograph" to have the necessary beneficial effect on the protected species.

The FWS has never found that an exact replication of the natural hydrograph was necessary to avoid jeopardy to the protected species, and the record shows "a rational connection between the facts found and the decision made" about the timing of the low flow period. *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, 378 F.3d 1059, 1065 (9th Cir.2004). Therefore, we affirm the grant of summary judgment to the Federal Defendants on this claim.

3. The Consistency of the 2003 Amended BiOp Factual Findings and the RPA for the Pallid Sturgeon

American Rivers argues, on the basis of the factual findings in the 2003 Amended BiOp and the administrative record underlying it, that the conditional replacement of the 2000 BiOp RPA summer low flow requirement with the mechanical construction of 1,200 additional acres of artificial shallow water habitat for the pallid sturgeon is arbitrary and capricious.

The 2003 Amended BiOp incorporated findings from the 2000 BiOp and stated that "[u]ntil a semblance of the normalized hydrograph is restored and habitat is generated and maintained through reestablishment of these [ecological] processes, listed species will continue to decline." In addition, the executive summary of the 2003 Amended BiOp summarizes, with regard to the pallid sturgeon:

> The proposed accelerated habitat restoration program in the Lower Missouri River will have

> little benefit to the pallid sturgeon without a concurrent or subsequent change in operations to provide a more normalized hydrograph to (1) provide the spawning cues that are critical for pallid sturgeon reproduction and (2) allow larvae and juveniles to move into shallow water habitat.

American Rivers contends that the above statements, and others like them in the administrative record, show that the FWS was irrational in abandoning any semblance of half of the natural hydrograph, the summer low flow, in exchange solely for habitat construction. However, evidence in the record adequately explains the decision made by the FWS. First, Appendix A of the Corps' 2003 Biological Assessment, entitled "New Information Since the 2000 BiOp," includes the results of extensive modeling of the river showing that the proposed 2000 BiOp summer low flow would be expected to increase suitable shallow water habitat by 1,189 acres over that existing during regular summer service flows. The creation of 1,200 acres of habitat, therefore, provides the same total acreage of accessible calm, shallow pools during regular summer service flows as the 2000 BiOp summer low flow would have produced. Second, the 2003 Amended BiOp RPA retains a spring rise requirement, and the Corps must tailor the spring rise to provide the necessary biological spawning cues and floodplain connectivity with the shallow water habitat. Third, the 2003 Amended BiOp RPA requires the Corps to monitor the pallid sturgeon population and collaborate with the FWS to adjust these measures if necessary. Finally, the avoidance of summer low flow preserves the existing Lisbon chute shallow water habitat, the only site in the river where larval pallid sturgeon occur naturally, from potential damage.

American Rivers argues that the 2003 Amended BiOp did not state that the mechanical construction of 1,200 acres was designed to replace the additional acreage that would have resulted from summer low flow. American Rivers contends that this rationale is therefore an impermissible post hoc rationalization by counsel. "[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action." *Motor Vehicle Mfrs.*, 463 U.S. at 50, 103 S.Ct. 2856. However, there is no requirement that every detail of the agency's decision be stated expressly in the 2003 Amended BiOp. The rationale is present in the administrative record underlying the document, and this is all that is required. *Mo. Coalition for the Env't v. Corps of Eng'rs of the United States Army*, 866 F.2d 1025, 1031 (8th Cir.1989), *overruled on other grounds*, *Goos v. ICC*, 911 F.2d 1283 (8th Cir.1990). Therefore, the Federal Defendants' rationale is not an impermissible post hoc rationalization.

We conclude that the Federal Defendants have demonstrated a rational connection between the facts in the record and the decision to substitute 1,200 mechanically constructed acres of shallow water habitat for the 1,189 acres that would have been created by the 2000 BiOp summer low flow. Therefore, we affirm the grant of summary judgment to the Federal Defendants on this claim.

4. The Consistency of the 2003 Amended BiOp Factual Findings and the RPA for the Least Tern and Piping Plover

American Rivers argues that the elimination of the 2000 BiOp RPA spring rise and summer low flow requirements for the benefit of the least tern and piping plover is arbitrary and capricious. The 2000 BiOp flow requirements

for the tern and plover were premised on factual findings that a spring rise was necessary to scour vegetation from sandbars, while the summer low flow would expose the resulting sparsely vegetated sandbars for safe nesting. The 2003 Amended BiOp RPA replaced the spring rise and summer low flow requirements with increased focus on the mechanical construction and clearing of sandbar habitat for the birds and adjustment of flow levels during the nesting season to minimize the potential for flooding nests.

In making these changes in the 2003 Amended BiOp, the FWS had the benefit of a new Corps analysis of the river's geomorphological processes. The Corps' computer models indicated that, given the man-made alterations to the river channel, a spring rise as envisioned in the 2000 BiOp would not produce scoured sandbar habitat for use by the tern and plover. In fact, the models showed that those flows were more likely to reduce the quality of previously available habitat.

The 2003 Amended BiOp also included information about tern and plover populations that was not available for the 2000 BiOp. The updated information included the fact that "recent counts of least terns (approximately 12,305 terns in 2003) exceed the overall recovery objective of 7,000 birds," although geographic distribution and population stability goals were not yet satisfied. Regarding the recovery goal for piping plovers, the 2003 Amended BiOp stated that "[i]n 2001, the Missouri River exceeded this recovery goal for the first time. It was also exceeded in 2002 and 2003."

Based on this new information, it was rational for the FWS to conclude that the 2000 BiOp spring rise and summer low flow elements were not necessary to avoid

jeopardy to the tern and plover, and to instruct the Corps to focus its resources on the mechanical construction of habitat, monitoring and adaptive management.

American Rivers cites the lack of conclusive proof in the administrative record that the mechanically constructed sandbars will develop into an ecologically functional habitat for the plover and tern. American Rivers contends that, without such conclusive proof, the 2003 Amended BiOp RPA fails to satisfy the ESA § 7 requirement that the plan "insure" against jeopardy to the listed species. This argument fails because, while the proposed mitigation measures must insure against jeopardy to the protected species if they work as intended, while there must be a rational reason to expect them to work as intended, and while they must in fact be possible to implement, there is no requirement for the FWS to ensure the overall success of the plan. *See Southwest Ctr. for Biological Diversity v. United States Bureau of Reclamation*, 143 F.3d 515, 523-24 (9th Cir.1998). We also note that the 2003 Amended BiOp requires the Corps to monitor closely the performance of the mechanically constructed sandbar habitat and test methods of improving the mix of organic material in the sandbars.

Finally, American Rivers cites its own experts for the contention that the higher-magnitude 2000 BiOp RPA spring rise would be more beneficial to the protected species than the default spring rise in the 2003 Amended BiOp RPA. We need not address that contention:

> [The FWS] was not required to pick the first reasonable alternative [it] came up with in formulating the RPA. [It] was not even required to pick the best alternative or the one that would most effectively protect the [species] from jeopardy.

> The [FWS] need only have adopted a final RPA which complied with the jeopardy standard and which could be implemented by the agency.

Southwest Ctr. for Biological Diversity, 143 F.3d at 523 (quotation omitted).

"Because there was a rational connection between the facts found in the [BiOp] and the choice made to adopt the final RPA, and because we must defer to the special expertise of the FWS in drafting RPAs that will sufficiently protect endangered species," the decision to eliminate the 2000 BiOp flow changes from the 2003 Amended BiOp RPA for the plover and tern was not arbitrary and capricious. *Id.* We affirm the grant of summary judgment to the Federal Defendants on this claim.

E. Selection of the Preferred Alternative in the EIS

American Rivers argues that the Corps' selection of the Preferred Alternative ("PA") was arbitrary and capricious because the Corps did not sufficiently explain why the PA was superior to plan GP2021, favored by American Rivers. Plan GP2021 included the spring rise and summer low flow prescribed by the 2000 BiOp RPA, while the PA became the 2004 Master Manual.

The EIS contains summary statements about the selection of the PA, such as:

> The Corps believes that the PA, when combined with the other measures . . . , conserves more water in the upper three lakes during extended droughts, meets the needs of ESA-listed fish and wildlife species, is consistent with the Corps' responsibilities

> under environmental laws and tribal trust responsibilities, and provides for the Congressionally authorized uses of the System.

American Rivers argues that because plan GP2021 also generally meets those same criteria and outperforms the PA with respect to wildlife concerns, the Corps' decision to select the PA has not been sufficiently explained. "[A]n agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs.*, 463 U.S. at 48, 103 S.Ct. 2856.

NEPA requires an agency to present the EIS alternatives in comparative form, "sharply defining the issues and providing a clear basis for choice among options by the decision-maker and the public." 40 C.F.R. § 1502.14. In this case, the EIS included a detailed comparative analysis of the effects of all five alternatives on a wide range of interests including fish and wildlife resources, flood control, water supply, hydropower, recreation and navigation. This analysis, presented in a series of tables, enables the reader to compare the relative effectiveness of each of the alternatives, as required by NEPA. For example, the Federal Defendants point to tables showing the strong superiority of the PA over plan GP2021 in maximizing summer revenue from reservoir hydropower production while creating far less risk of disruption for downstream summer power generation. The tables also show that the PA outperforms plan GP2021 in the areas of navigation, groundwater damage and floodplain crop damage. "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson v. Methow*

Valley Citizens Council, 490 U.S. 332, 350, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989).

Contrary to what American Rivers seems to suggest, there is no further NEPA or Administrative Procedure Act requirement to repackage the information in the summary tables into prose one-to-one comparisons of the PA with each of the other alternatives. We conclude that the comparisons provided in the EIS "cogently explain why [the Corps] has exercised its discretion in a given manner." *Motor Vehicle Mfrs.*, 463 U.S. at 48, 103 S.Ct. 2856. Therefore, we affirm the grant of summary judgment to the Federal Defendants on this claim.

F. Claim of the Mandan, Hidasta and Arikara Nation Regarding the Management of Lake Sakakawea

The Nation claims that the Corps has failed to choose the FCA – and ESA-compliant reservoir management plan that best spurs economic self-sufficiency for the Nation's members and protects the Nation's cultural resources. The Nation seeks a court order to enjoin the Corps to correct these "deficiencies." The MDL court dismissed the Nation's claim for lack of Article III standing.

To show Article III standing, a plaintiff must demonstrate (1) an "injury in fact" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," (2) "a causal connection between the injury and the conduct complained of," and (3) a likelihood, as opposed to mere speculation, "that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quotations omitted).

The Nation articulates its members' general interest in the operation of Lake Sakakawea, including an interest in the economic health of the sport fishing industry located there. However, the Nation does not articulate how reservoir operations under the 2004 Master Manual cause an injury to the Nation that can be redressed by a favorable court decision. There is nothing in the amended complaint, for example, stating why reservoir operation under the 2004 Master Manual, which is more sensitive to reservoir recreation needs during prolonged droughts than was the 1979 Master Manual, will damage the viability of Lake Sakakawea's sport-fishing industry. Furthermore, if we were to do exactly as the Nation requests in its amended complaint and order the Corps to re-formulate the 2004 Master Manual in a manner that, given FCA and ESA constraints, would best "spur Tribal self sufficiency and economic development and protect Indian trust assets," it is not at all clear what outcome could be adjudged to comply with our order. The Nation simply has not set forth a "concrete and particularized" injury that is likely to be redressed by such an order. *Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130. Therefore, we affirm the dismissal of this claim for lack of Article III standing.

G. Extra-Record Materials Offered by American Rivers

Nebraska challenges the submission of three declarations by American Rivers that were not part of the administrative record. The MDL court apparently considered Nebraska's motions to strike these declarations to be moot. Because we affirm the grant of summary judgment to the Federal Defendants on American Rivers' claims, we also find Nebraska's motions to strike to be moot.

III. CONCLUSION

On the following three claims, we vacate the MDL court's grant of summary judgment to the Federal Defendants and instruct the MDL court to dismiss without prejudice: (1) NPPD's claim that the FWS failed to consider the economic feasibility of the summer low-flow requirement in developing the 2003 Amended BiOp; (2) Missouri's claim that the loss of shallow water habitat for larval and juvenile pallid sturgeon in central Missouri resulting from summer low flow constitutes an impermissible "take" of the sturgeon under ESA § 9; and (3) Blaske Marine's NEPA claim that a supplemental EIS is required for the 2003 Amended BiOp summer low-flow requirement. On all other claims, we affirm the judgment of the MDL court.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Operation of the Missouri River System Litigation — 03-MD-1555 (PAM)

MEMORANDUM AND ORDER

This matter is before the Court on various Motions for Summary Judgment. This case arises out of the management of the Missouri River, which flows from Montana to Missouri. Pursuant to the Flood Control Act of 1944 ("FCA"), the United States Army Corps of Engineers ("Corps") manages the river and its reservoirs. In conjunction with its responsibilities under the FCA, the Corps developed a more detailed management plan, the "Missouri River Main Stem Reservoir System Master Water Control Manual" ("Master Manual"). The Master Manual was first developed forty years ago, and has been revised three times, in 1973, 1975 and 1979. In the late 1980s, the Corps began to revise the Master Manual again. Finally, after fifteen years and repeated delays, the Corps issued a revised Master Manual on March 19, 2004.[1] The Corps

[1] Revision of the Master Manual is an extensive and lengthy process that requires the Corps to consult with various agencies and comply with various regulations and procedures. Prior to the issue of the new Master Manual, the Corps must issue a Final Environmental Impact Statement ("Final EIS"), and allow 30 days for public review and comment as required by the National Environmental Policy Act ("NEPA"). Here, the Court shortened the NEPA review period to two weeks and required the Corps to issue a revised Master Manual on March 19, 2004. On March 1, 2004, the Corps requested a waiver of the NEPA review period, which the Environmental Protection Agency ("EPA") granted "for compelling reasons of national policy." From the outset, the Court refuses to entertain any Motions attacking the

(Continued on following page)

also issued the 2004 Annual Operating Plan ("AOP") on March 19, 2004.

Over the last several years, the Missouri River has experienced prolonged drought conditions. The Corps has been forced to make difficult decisions regarding the allocation of water to the different interests in the basin. As a result, interested parties filed lawsuits in various districts, seeking to protect their interests. *See American Rivers v. U.S. Army Corps of Eng'rs*, File No. 1:03-241 (D.D.C.); *Nebraska v. Ubbelohde*, 8:02-217 (D. Neb.); *Blaske Marine, Inc. et al. v. Norton*, File No. 8:03-142 (D. Neb.); *North Dakota v. Ubbelohde*, File No. 1:02-59 (D. N.D.); *South Dakota v. Ubbelohde*, File No. 3:02-3011 (D. S.D.). In July 2003, the multi-district litigation panel consolidated these actions and transferred them to this Court. *In re Operation of the Missouri River Litig.*, File No. 03-1555 (PAM). Pursuant to the Court's scheduling order and as a result of the coordinated efforts of the parties, the issues presented in these various cases are now before this Court. This Memorandum and Order disposes of all claims before the Court.

BACKGROUND

A. The Parties

The parties involved in this action include: (1) the states of North Dakota, South Dakota, Montana, Nebraska, and Missouri; (2) Blaske Marine, Coalition to Protect the Missouri River, ConopcoPhillips Company,

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sufficiency of the NEPA review period and dismisses all claims pertaining to this issue.

Ergon Asphalt & Emulsions, Inc., Magnolia Marine Transport Company, Midwest Area River Coalition 2000, and Midwest Terminal Warehouse Company, Inc. (collectively "Blaske Marine"); (3) MO-ARK Association and Missouri River Keepers (collectively "MO-ARK"); (4) American Rivers, Environmental Defense, National Wildlife Federation, various state Wildlife Federations, and Izaak Walton League of America (collectively "American Rivers"); (5) Missouri River Energy Services ("MRES"); (6) Nebraska Public Power District ("NPPD"); (7) the Mandan, Hidasta and Arikara Nation ("the Nation"); and (8) the Corps, Fish and Wildlife Service ("FWS"), and various directors, secretaries and officers of these two government agencies (collectively "Federal Defendants"). Because of their competing interests, it is difficult to classify each party as a Plaintiff, Defendant, or both. Rather, the claims can be categorized into four different topics: (1) Flood Control Act ("FCA") claims; (2) Endangered Species Act ("ESA") claims; (3) NEPA claims; and (4) collateral claims. The Court will address each topic in turn.

B. The Revision of the Master Manual

In 1990, pursuant to the Endangered Species Act ("ESA"), the Corps conducted its first consultation with the FWS on the effects of its Missouri River operations on endangered and threatened species.[2] In 2000, the Corps

[2] An endangered species is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A threatened species is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

again consulted with the FWS. Following these consultations, the FWS issued the 2000 Biological Opinion ("2000 BiOp"), that concluded that the Corps' proposed river operations for 2000 were likely to jeopardize three species: the endangered least tern, the threatened piping plover, and the endangered pallid sturgeon. (Fish and Wildlife Service Administrative Record ("FWS AR") 1237 at 29216-17.) The 2000 BiOp included a Reasonable and Prudent Alternative ("RPA"), designed to avoid jeopardy to the tern, plover and sturgeon. Specifically, this RPA recommended a spring rise and low summer water flow regime, in conjunction with habitat construction, to avoid jeopardy. (*Id.* at 29229-32.)

In April 2003, the Corps consulted with the FWS again on the Corps' proposed operations for 2003. The FWS then issued a supplemental Biological Opinion, concluding that although the proposed operations for 2003 deviated from the RPA in the 2000 BiOp, the proposed operations were justified. The District Court of the District of Columbia disagreed, and granted a preliminary injunction ordering the Corps to comply with the 2000 BiOp. *See American Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230 (D.D.C. 2003). In November 2003, the Corps again consulted with the FWS. The FWS then amended the 2000 BiOp. (2003 Amended Biological Opinion (hereinafter "2003 Amended BiOp") at FWS AR 1457.) The FWS again concluded that jeopardy would result to the plover, tern and the sturgeon, and proposed a new RPA. The 2003 RPA contained three separate parts, each part applicable to a single species.

As noted above, the Corps issued the 2004 Master Manual on March 19, 2004. The 2004 Master Manual, along with the 2004 AOP, are based on the 2003 Amended

BiOp. In accordance with NEPA, the Corps issued the Final EIS for the 2004 Master Manual on March 5, 2004. This Court truncated the public comment and review period for the 2004 Master Manual. Therefore, on March 19, 2004, pursuant to Court Order, the Corps issued the 2004 AOP, 2004 Master Manual, and Record of Decision ("ROD"). The issues in this litigation involve both the substance of the 2004 Master Manual and the procedures the Corps used to formulate the 2004 Master Manual.

DISCUSSION

This case involves the interplay of the Corps' obligations under the FCA, ESA and NEPA. The FCA authorizes the Corps to operate the Missouri River by balancing a variety of river interests. The ESA seeks to protect and conserve endangered and threatened species and their habitats. NEPA requires agencies to consider and evaluate the potential environmental consequences that may result from an agency action. The Corps must consider both competing river interests and its legal obligations in the operation of the Missouri River.

A. The Flood Control Act of 1944

1. Navigation and Flood Control

The FCA provides for the management of the Missouri River and its reservoirs. Pub. L. No. 78-534, 58 Stat. 887 (1944). The FCA is the product of the "Pick-Sloan" plan. The "Pick" Plan, submitted to Congress by the Corps, proposed the construction of reservoirs to effectively control flooding, but also acknowledged that "[t]he development of such a comprehensive plan involves adjustment of many factors of flood control, navigation, irrigation,

hydroelectric power production and numerous other functions of water conservation and management." H.R. Doc. No. 78-475 at 6 (1944). The "Pick" Plan did not rank any river interest above another, but rather seeks to provide the "widest range of multiple benefits" and "to contribute most significantly to the welfare and livelihood of the largest number of people." *Id.* at 7. The "Sloan" Plan, submitted to Congress by the Bureau of Reclamation, proposed the construction of reservoirs "for the purposes of storing water, and releasing it during periods of low flow . . . [s]uch reservoirs will contribute to flood control . . . aid navigation . . . enlarge the supply of water available for irrigation . . . and . . . make practicable the generation of electrical energy." S. Doc. No. 78-191 at 18 (1944). The "Sloan" Plan does not dictate a priority of river interests, but rather seeks to provide a "basin-wide plan most likely to yield the greatest good to the greatest number of people." *Id.* at 17. The "Sloan" Plan declared that any plan for operation of the river must "recognize all beneficial uses of waters, weigh their relative values, and make a compromise, from a basin-wide viewpoint, in each instance of conflict." *Id.* at 21. These two plans combined to develop one plan for the river's operation, the "Pick-Sloan" Plan. S. Doc. No. 78-247 (1944). This "unified" plan was intended to "secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation" in the Missouri River. *Id.* at 5; *See Id.* at 2.

Courts acknowledge that the "dominant" functions of the FCA include flood control and downstream navigation, but they also acknowledge that other river interests should similarly be provided for. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512 (1988); *See also South Dakota*

v. Ubbelohde, 330 F.3d 1014, 1019-20 (8th Cir. 2003). The Eighth Circuit acknowledged that the FCA requires that "the Corps must strike a balance among many interests, including flood control, navigation and recreation." *Ubbelohde*, 330 F.3d at 1019, 1027. The Corps' obligations under the ESA are within the scope of these "many interests." *See American Rivers*, 271 F. Supp. 2d at 252. Because of this balance, the Court may only review the Corps' actions to ensure that the Corps considered all river interests when formulating a given plan. *Id.* at 1027. The language of the FCA does not require a particular outcome, but rather that the Corps consider all interests in its operations. *Id.* There is no language in either caselaw or legislative history that dictates that the Corps must always maintain a particular water level or specific water season in its river operations. All river interests must be considered and evaluated to "secure the maximum benefits" to river interests. The Court finds that the FCA does not impose a non-discretionary duty to maintain minimum navigation flows or season lengths. The Corps' prioritization of river interests is discretionary.

However, the Corps is not entitled to abandon these interests; it must consider and balance river interests to achieve maximum benefits. Some parties propose that navigation is abandoned under the 2004 Master Manual, because in the event that by March 15 total system storage is below 31 million acre-feet, the 2004 Master Manual provides that flows be reduced such that the navigation season is eliminated for that particular water year. As the Corps points out, however, the FCA requires it to defer to upstream consumptive uses in the event these uses "conflict" with downstream navigation. *See* 33 U.S.C. § 701-1(b). In the rare event that this condition presents itself,

the 2004 Master Manual's elimination of the navigation season ensures that upstream consumptive uses are given deference as required by law. The Court finds that the 2004 Master Manual complies with the FCA.

The priority that the Corps gives the competing river interests is a discretionary function, and subject to the ESA. If Congress intended to require that the Corps always maintain minimum levels of navigation or a specific navigation season, then Congress must amend the FCA accordingly. Absent any evidence to the contrary, the Court concludes that prioritization of river interests is discretionary.

2. Ambiguity of the Master Manual

Ubbelohde declared that the 1979 Master Manual limited the Corps' discretion to operate the Missouri River. 330 F.3d at 1029. As a result, *Ubbleohde* found that judicial review of the Corps' decisions was appropriate. *Id.* In reaching that conclusion, the Eighth Circuit relied on a combination of three considerations: (1) the language of the manual itself; (2) the corresponding agency regulations at 33 C.F.R. § 222.5; and (3) the Corps' treatment of the manual. *Id.* (citing *Northwest Nat'l Bank v. Dep't of the Treasury,* 917 F.2d 1111, 1116-17 (8th Cir. 1990)). Unlike the 1979 Master Manual, the 2004 Master Manual expressly states that "the Master Manual has been amended to clearly reflect the Corps' intent that it not be considered a binding regulation." (2004 Master Manual, at Introduction.) The Corps essentially is attempting to reserve the right to vary operations from those set forth in the Master Manual, in the event that changed conditions or unforeseen circumstances require it to do so. The Corps insists

that the FCA, its regulations, and the *Ubbelohde* decision permit it to retain such discretion in its operations. Missouri, Nebraska, and the NPPD insist that this discretion is expressly prohibited by *Ubbelohde*.

Missouri, Nebraska and NPPD misinterpret the discretion the Corps seeks to retain. The Corps does not intend to disregard the Master Manual and thus operate the River with unfettered discretion. To the contrary, the Corps seeks to retain the discretion to deviate from the 2004 Master Manual in the event that unforeseen circumstances arise. The Corps cannot anticipate and provide for all possible circumstances affecting river operations. Although historical patterns provide some insight into future circumstances, the Corps simply cannot predict the future. If the Corps was prohibited from varying its operations from the Master Manual to adjust for unforeseen circumstances, and instead was required to conform to a Master Manual that did not contemplate a given situation, the Corps would arguably violate its obligations under the FCA and *Ubbelohde* to properly balance river interests.

However, the Court does not construe this discretion to permit the Corps to perpetually evade judicial review. The Eighth Circuit determined that the 1979 Master Manual could serve as a basis for court review. *Ubbelohde*, 330 F.3d at 1029-30. Although the Eighth Circuit made this determination in part by examining the language of the 1979 Master Manual, it also relied on the regulations governing the Corps' promulgation of the Master Manual. Particularly, these regulations "are not the types of procedures one would expect in the promulgation of an internal, non-binding agency guideline." *Id.* at 1029; 33 C.F.R. § 222.5. Therefore, pursuant to *Ubbelohde*, this Court

determines that the 2004 Master Manual may likewise serve as a basis for judicial review. The 2004 Master Manual, like the 1979 Master Manual, is binding on the Corps to the extent that the parties may seek judicial review to ensure that the Corps' operations conform to the 2004 Master Manual. The Corps acknowledges that it must abide by the 2004 Master Manual, and that any permanent amendment to the existing provisions of the 2004 Master Manual must go through the procedures contained in 33 C.F.R. § 222.5. (Fed. Defs.' Reply Mem. in Supp. of Mot. on FCA and NEPA at 12.) The Court acknowledges that the Corps must be permitted to vary its operations in the event that changed circumstances require it to do so, but similarly holds that this discretion does not eliminate the propriety of judicial review of the lawfulness of the agency action. Therefore, the 2004 Master Manual satisfies the procedural requirements of *Ubbelohde* and the FCA.

3. Recreational Interests

South Dakota maintains that the FCA subordinates navigation to upstream uses of irrigation and domestic water supply. The "O'Mahoney-Millikin Amendment," 33 U.S.C. § 701-1(b) states:

> The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in states lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters

> for domestic, municipal, stock water, irrigation, mining or industrial purposes.

This provision requires that when a conflict between upstream consumptive uses and downstream navigation exists, upstream consumptive uses receive deference. South Dakota does not argue that the 2004 Master Manual does not serve these consumptive uses. Rather, South Dakota argues that the 2004 Master Manual is in "conflict" with South Dakota's consumptive beneficial uses, because the 2004 Master Manual allows for lower levels in reservoirs such that South Dakota may be required to build extensions to irrigation lines or extend intake structures for drinking water at these reservoirs.

South Dakota's argument lacks merit. The statute is not designed to protect against these kind of difficulties, but rather designed to "prohibit destruction of state-created water rights without any compensation at all, by the assertion of an overriding federal easement for navigation." *Turner v. Kings River Conservation Dist.*, 360 F.2d 184, 192 (9th Cir. 1966) (interpreting 33 U.S.C. § 701-1). Moreover, requiring South Dakota to build extensions for irrigation lines or drinking water is not in "conflict" with South Dakota's consumptive beneficial uses, because there is no destruction or denial of South Dakota's water rights. *Kansas v. United States*, File No. 00-4153, 2000 WL 1665260 (D. Kan. Sept. 29, 2000) (finding that mere "potential threat" that Corps' drainage of water from three reservoirs would deny adequate drinking water or interfere with industrial purposes insufficient to constitute "conflict" with Corps' actions). In fact, the 2004 Master Manual sets forth the minimum levels required to be maintained in the upstream reservoirs, and a "safety cushion" that ensures that these reservoir levels are

maintained even under drought conditions. (*See* 2004 Master Manual, §§ VII-10 to VII-11 & Table VII-3.) The 2004 Master Manual complies with the FCA.

4. Conclusion

The Corps' Motion for Summary Judgment on FCA claims is granted. Motions by South Dakota, Nebraska, NPPD, Missouri and Blaske Marine Plaintiffs are denied.

B. The Endangered Species Act and Related Claims

The ESA seeks "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and "to provide a program for the conservation of such . . . species." 16 U.S.C. § 1531(b). The ESA prohibits any person, including federal agencies, to "take" a listed endangered species. 16 U.S.C. § 1538(a)(1)(B). "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." 16 U.S.C. § 1532(19).

In the event that its proposed action may jeopardize a listed species, the Corps must prepare a "biological assessment" evaluating both the species in the action area as well as the potential effects the proposed action may have on the species in the action area. *See* 50 C.F.R. § 402.02 (defining biological assessment). A proposed action will "jeopardize" the species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." *Id.* If the Corps concludes that its proposed actions may adversely affect the listed

species, then it must initiate consultation with the FWS. This consultation is required to "insure" that the Corps' proposed action "is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2).

After this consultation, the FWS must prepare and issue a Biological Opinion ("BiOp") to the Corps. 16 U.S.C. § 1536(b)(3). The BiOp must set forth the FWS's opinion, with supporting information, detailing how the Corps' proposed actions will affect the species. 16 U.S.C. § 1536(b)(3)(A). In the event that the FWS concludes that jeopardy to the species will result, the FWS must also set forth a RPA. *Id.* A RPA is an alternative action "that can be implemented in a manner consistent with the intended purpose of the action," within the Corps' legal authority. 50 C.F.R. § 402.02. A RPA must also be economically and technologically feasible for the Corps to implement. *Id.* The RPA is designed to avoid the likelihood of jeopardizing the continuing existence of the species. *Id.* If the FWS concludes that either the Corps' proposed action or the implementation of a RPA may still result in an incidental take of the species, the FWS must also include an Incidental Take Statement ("ITS") in the BiOp. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i) (setting forth requirements for ITS). An incidental take statement identifies the impact that the take will have on the species, identifies "reasonable and prudent measures" ("RPM") considered necessary to minimize the impact, and sets forth the terms and conditions required to implement the RPMs. *Id.* If the Corps' action is otherwise in compliance with the terms and conditions set forth in the ITS, any action that harms

a listed species will not be considered a "take" under the ESA. 16 U.S.C. § 1536(o).

Because the ESA makes no specific provision for judicial review of final agency actions, the scope of the review is governed by the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.* The Court reviews an agency action to determine if it was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). If the agency decision fails to articulate a satisfactory explanation for its conclusions, relies on factors which Congress did not intend for it to consider, or fails to consider an important aspect of the problem, that decision is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under this standard, the Court's review is narrow, evaluating whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989).[3] The Court should defer to the agency so long as the agency's interpretation of the evidence was reasonable. *Id.* The Court may not substitute its judgment for that of the agency. *Citizens to Preserve Overtone Park, Inc. v. Vole*, 401 U.S. 402, 416 (1971).

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[3] American Rivers and other parties argue that Federal Defendants are subject to a heightened standard of review, because the 2003 Amended BiOp is a "reversal" of the 2000 BiOp. The Court disagrees. The law does not require that Federal Defendants provide extensive justification for the Corps' decision. Rather, the decision must be "rational," providing "permissible reasons" for the change. *American Rivers v. U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 255-56 (D.D.C. 2003).

1. Claims by American Rivers

American Rivers contends that the Corps should maintain river operations pursuant to the 2000 BiOp. As a result of the 2000 ESA consultations, the FWS issued the 2000 BiOp that concluded that the Corps' proposed operations would cause jeopardy to the tern, plover and sturgeon. The RPA in the 2000 BiOp recommended that the Corps utilize both water flows and habitat construction, among other elements, to avoid jeopardy to the plover, tern and sturgeon. (FWS AR 1237 at 29232.) In November 2003, the Corps and the FWS reinitiated consultation under the ESA. The FWS then issued the 2003 Amended BiOp, which again concluded that the Corps' proposed operations would cause jeopardy to the plover, tern and sturgeon. The 2003 Amended BiOp recommended a multiple species RPA to avoid such jeopardy. The RPA has individual sections allocated to each one of the species. In particular, the 2003 RPA no longer requires both flow modification and habitat construction to avoid jeopardy to the plover and tern. The sturgeon RPA maintains both flow changes and habitat construction, though modified somewhat from the 2000 BiOp RPA.

American Rivers submits numerous arguments challenging the validity of the 2003 Amended BiOp. American Rivers contends that the FWS's elimination of flow changes in the 2003 RPA applicable to the plover and tern is arbitrary and capricious, and that the changes made to the sturgeon RPA are also arbitrary and capricious in violation of the ESA. American Rivers also maintains that the 2003 Amended BiOp violates the ESA because it does not "insure" against jeopardy. As a result, because the Corps fails to follow the 2000 BiOp, American

Rivers contends that the Corps' actions "take" the plover, tern and sturgeon in violation of the ESA.

a. Plover and Tern RPA

The 2000 BiOp recommended that a spring rise and low summer flow were necessary to avoid jeopardy to all three species. The 2003 Amended BiOp adopts many of the findings and conclusions of the 2000 BiOp, including the general conclusion that flow modifications coupled with habitat construction will prevent jeopardy to the species. (FWS AR 1457 at 33714, 33736.) However, unlike the 2000 RPA, the 2003 RPA eliminates the requirement that both flow modifications and habitat construction are essential to avoid jeopardy to the plover and the tern. Instead, the 2003 RPA contains additional elements, such as a drought conservation plan, Gavins Point dam summer releases, accelerated construction of shallow water habitat, and adaptive management, that together avoid jeopardy to the plover and tern. (FWS AR 1451 at 33187.)

The 2003 Amended BiOp relies on updated information: (1) completion of a report by the National Academy of Sciences' National Research Council, "The Missouri River: Exploring the Prospects for Recovery;" (2) analysis of the reservoir releases pursuant to the 2000 RPA; (3) continued monitoring and study of listed species; (4) use of a new model to better analyze use of reservoir habitat by the tern and plover; and (5) the critical habitat designation of the plover in October 2002. (FWS AR 1291 at 31065.) Particularly relevant to the plover and the tern is the new information relating to the analysis of the 2000 RPA and the continued monitoring of the species since the 2000 BiOp. (*Id.*) Since the 2000 BiOp, both the plover and the tern

populations have experienced some improvement. (FWS AR 1457 at 33701, 33704.) Further, analysis of the implementation of the 2000 BiOp RPA indicated that intended habitat objectives could not be achieved, and that in fact, spring and summer flows specified in the 2000 BiOp RPA actually impeded the development of sandbar habitat essential to plover and tern survival. (FWS AR 1457 at 33545.)

Elimination and degradation of both plover and tern habitat contribute to the declining status of the species. The 2000 RPA proposed both spring and summer flows and habitat construction to "restore, maintain, and create sandbar habitat for terns and plovers." (FWS AR 1290 at 31040; *See* FWS AR 1237 at 29230.) However, the Corps sets forth, and the FWS adopts, that the "alluvial geomorphic process" indicated that spring and summer flows would not create sandbar habitat but would potentially destroy beneficial sandbar habitat. (FWS AR 1290 at 31040; FWS AR 1290 at 31067; FWS 1457 at 33545.) Therefore, the Corps proposed, and the FWS agreed, that the elimination of spring and summer flows coupled with the addition of new RPA elements, would continue to avoid jeopardy to the plover and the tern. American Rivers does not point to any evidence that indicates that the only possible way to avoid jeopardy to the plover and the tern is to implement flow changes and habitat construction. The FWS modified the RPA to prevent further degradation to the plover and tern habitat. Although American Rivers may disagree with the FWS's conclusions, the FWS has

articulated a rational basis for its decision to eliminate spring and summer flow changes from the 2003 RPA.[4]

American Rivers also argues that the FWS improperly evaluated the effects on the plover and tern from the Corps' proposed operations. The Court disagrees. Although the FWS utilized a "worst-case-scenario analysis" for both the plover and the tern, the FWS also considered both the historical effects and cumulative and indirect effects of the Corps' proposed operations on the plover and tern. (FWS AR 1287; FWS AR 1540; FWS AR 1457 at 33608-30; 33634-42; 33683-85.) The baseline adopted by the FWS is proper.

b. Sturgeon RPA

The sturgeon RPA retains both flow modifications and habitat construction. The 2003 RPA proposes higher summer flows than the summer flows required in the 2000 RPA. The 2000 RPA states that "[s]ummer flows shall be decreased . . . to an interim target of 25 Kcfs by June 21, and held at 25 Kcfs until July 15 . . . on July 15, the flows shall be stair-stepped down to a flow of 21 Kcfs until August 15." (FWS AR 1237 at 29230.) The 2003 RPA proposes that for 2004, "summer habitat flow[s] [shall be] no greater than 25 Kcfs beginning no later than July 1,

[4] Even so, the 2003 RPA does not eliminate flow changes altogether. Although it may not specifically require the implementation of flow changes in order to preserve the plover and the tern, the RPA requires the Corps to develop a water plan that includes a spring rise and low summer flow. In the event the Corps fails to develop such a plan by March 1, 2006, a default water plan that includes both a spring rise and low summer flow must be implemented. (FWS AR 1457 at 33761-62.)

2004 lasting for a minimum of 30 days at its lowest point." (FWS AR 1457 at 33760.) The 2003 RPA also allows the Corps to develop its own water flow regime, no later than March 1, 2006, but provides a default plan in the event the Corps is unsuccessful. This default plan states that: "[b]eginning on or about June 15, 2006 but no later than July 1, 2006 the Corps shall begin reducing flows to provide a minimum 30 day summer low flow release of no greater than 25 Kcfs." (*Id.* at 33762.) The Court disagrees with American Rivers' assertion that this change in summer flows is arbitrary and capricious. The 2003 Amended BiOp RPA prevents low summer flows from exceeding 25 Kcfs, and as the Corps points out, the effect at operating at 25 Kcfs instead of 21 Kcfs is minimal. Moreover, these modifications are further complemented by the implementation of other elements in the 2003 RPA.

American Rivers also argues that the 2003 RPA delays implementation of a spring rise, which was required by the 2000 RPA. The Court disagrees. The 2000 RPA permitted a spring rise only in the event that river conditions allowed such a rise. (FWS AR 1237 at 29230.) The 2003 RPA similarly permits a spring rise provided water conditions are favorable. (FWS AR 1457 at 33760-61.) In 2004, because of unfavorable water conditions, there was no spring rise. Whether a spring rise will occur in 2005 depends on the status of water conditions in 2005. The 2003 RPA does not delay spring rise, but rather requires it under favorable conditions, similar to the requirements of the 2000 RPA. Moreover, under the 2003 RPA, the Corps "shall, if hydrologic conditions are suitable, initiate an experimental spring pulse to assist and inform the process for establishing a long-term flow plan." (FWS AR 1457 at 33760-61.) Unlike the 2000 RPA, the 2003 RPA requires an

annual spring rise, provided conditions are favorable. American Rivers' argument that the Corps has delayed a spring rise is without merit.

American Rivers also complains that the magnitude of the spring rise in the 2003 RPA is greatly reduced from the 2000 RPA. In the 2000 RPA, the spring rise was included to provide a spawning cue for the sturgeon, and to create and maintain sandbar habitat for the plover and the tern. Although the 2003 RPA does not require a spring rise of the same absolute magnitude as the 2000 RPA, it requires a bimodal spring rise. Water flows do not effectively construct habitat for the plover and the tern, and a bimodal spring pulse may provide greater spawning cues for the sturgeon. (FWS AR 1457 at 33761, 33765; FWS AR 1291 at 31067-72.) Any change in flood plain connectivity as a result of a lower absolute magnitude is also minimal. (Corps AR 1332 at 45605.) Although the spring rise in the 2003 RPA may differ from that in the 2000 BiOp, it is not unlawful.

American Rivers also contends that the accelerated construction of shallow water habitat is improper. Both the 2000 BiOp and the 2003 Amended BiOp recommend that the Corps develop twenty to thirty acres of shallow water habitat per mile of the Missouri River, in an effort to sustain the continued survival of the sturgeon. Although lower flows contribute to the creation of shallow water habitat, such flows do not create enough shallow water habitat to ensure the sturgeon's viability. The 2003 Amended BiOp thus included a measure that requires the Corps to artificially construct shallow water habitat in an effort to meet habitat standards. The Corps is currently operating to construct such artificial habitat, and intends to continue such operations in the future. (FWS AR 1290

at 31057.) This accelerated construction, in conjunction with other RPA elements, is an appropriate measure.

c. "No Jeopardy" Finding

American Rivers submits that the 2003 Amended BiOp is arbitrary and capricious because it does not insure against jeopardy. American Rivers argues that it is not "reasonably certain" that (1) required flow changes will occur; (2) congressional funding will be sufficient to implement artificial habitat construction; and (3) artificial habitat construction will be effective. The FWS's no jeopardy finding need only rely on a plan that is reasonably certain to be implemented. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196, 1213 (D. Ore. 2003).

American River argues that the 2003 Amended BiOp proposes flow changes that are not "reasonably certain" to occur. The 2003 Amended BiOp requires the Corps to develop, over the next two years, an appropriate flow regime that implements spring and summer flows to protect the sturgeon. In the event the Corps fails to develop this plan, the RPA sets forth a default flow plan that implements both spring rise and lower summer flows. Because the 2003 Amended BiOp requires that such changes be implemented at the latest by March 1, 2006, the Court finds that there is a reasonable certainty that such flow changes will take effect.

American Rivers also argues that the artificial construction of sandbar habitat for the plover and the tern is an unproven mitigation measure, and thus reliance on such construction was arbitrary and capricious. The record reflects that the FWS knew, considered and evaluated both

the negative and positive effects of artificial sandbar habitat construction. There is no evidence to suggest that the Corps will fail to implement the measures the FWS recommends. The Corps is further required, in addition to constructing habitat, to continuously monitor and evaluate effects on the plover and the tern, and modify operations as required. Though American Rivers disputes the ultimate success of artificial sandbar habitat creation on plover and tern populations, concerns of uncertainty are inevitable in any action an agency may take. Such concerns are insufficient to invalidate the 2003 Amended BiOp. Reasonable certainty only applies to the possibility of implementation, not to the overall success of the particular measure. The record supports that the FWS considered both the positive and negative effects of such measures, and thus rationally concluded, in conjunction with the other RPA elements, that this measure would avoid jeopardy to the species. Nothing more is required by the FWS.

American Rivers also argues that the Corps lacks appropriate funding to complete this habitat construction. By its nature, a RPA must be capable of implementation, both economically and technologically. 50 C.F.R. § 402.02. American Rivers points to no evidence to suggest that the Corps will be economically prevented from implementing this RPA. The speculative nature of congressional appropriations is insufficient to render the RPA arbitrary and capricious.

The Court finds that the FWS's 2003 Amended BiOp and its RPA are not arbitrary and capricious. The FWS has provided a rational connection between the facts and the choice made. *Motor Vehicles*, 463 U.S. at 43. Therefore,

the 2003 Amended BiOp and its RPA do not violate Section 7 of the ESA.

d. The Corps' Actions Result in a Take

American Rivers also argues that the Corps' adoption of the 2003 RPA jeopardizes the species and results in a "take" of the species, in violation of the ESA. After consulting with the FWS, the Corps has an independent duty to insure that its actions satisfy the ESA. 16 U.S.C. § 1536(a)(2). Essentially, the Corps' decision to rely on the 2003 Amended BiOp must not be arbitrary and capricious. Because the Court finds that the 2003 Amended BiOp is valid, the Corps' reliance on the 2003 Amended BiOp is likewise valid.

Section 9 of the ESA prohibits a "take" of the endangered or threatened species. 16 U.S.C. § 1538. American Rivers argues that the 2003 Amended BiOp and RPA take the plover, tern and the sturgeon. However, the ESA permits that any taking, in compliance with the Incidental Take Statement ("ITS"), "shall not be considered to be a prohibited taking" of the species. 16 U.S.C. § 1536 (o)(2). The 2003 Amended BiOp includes an ITS for the plover, tern, and sturgeon. (FWS AR 1457 at 33769-90.) The Corps has an absolute defense to a Section 9 claim so long as its operations are in accordance with the 2003 BiOp and the terms and conditions of the ITS. American Rivers fails to demonstrate that the Corps' operations are contrary to the 2003 Amended BiOp and its ITS, and therefore there is no violation of the ESA.

2. Claims by Nebraska and NPPD

Nebraska and NPPD ("Nebraska Parties") claim that the FWS and Corps improperly consulted under the ESA, resulting in an improper 2003 Amended BiOp and RPA. They contend that the environmental baseline used in the 2003 Amended BiOp is improper because it fails to include non-discretionary operations such as minimum flow levels. They further assert that the 2003 RPA is invalid because its proposed restoration of a natural hydrograph runs contrary to the Corps' obligations under the FCA. Because the Court concludes that the Corps does not have a non-discretionary duty to maintain minimum water flows, and that the Corps' operations are subject to the ESA, these arguments fail.

The Nebraska Parties further argue that the 2003 RPA is not economically feasible, because it improperly compromises both water supply and hydropower benefits to the Nebraska Parties. However, the requirement that a RPA be "economically and technologically feasible" only requires that the Corps have the resources and technology necessary to implement the RPA. *See Kandra v. United States*, 145 F. Supp. 2d 1192, 1207 (D. Or. 2001). This argument is likewise without merit.

The Nebraska Parties also argue that the 2003 Amended BiOp and RPA are arbitrary and capricious because they are not based on the best scientific data available. The 2003 Amended BiOp proposes to restore some of the river's natural hydrograph to water flows. According to the Nebraska Parties, this proposal bears no resemblance to the river's natural hydrograph, as set forth in the U.S. Geological Survey ("USGS"). (FWS AR 915 at 14687-885.) The 2003 Amended BiOp does not strictly

require the natural hydrograph contained in the USGS, but rather suggests that some "semblance" of the natural hydrograph be restored. (FWS AR 1457 at 33551.) The FWS need only recommend a RPA that prevents jeopardy, and there is no evidence that an immediate and complete restoration of pre-dam flows is the only way to prevent such jeopardy. The fact that the FWS chose not to propose a plan contained in one report is insufficient to render the FWS's decision arbitrary and capricious. The Nebraska Parties' Motions fail.

3. Claims by Blaske Marine Plaintiffs and Missouri

Blaske Marine and MO-ARK (collectively, "Blaske Marine Plaintiffs") and Missouri submit that the Corps should operate the Missouri River as required by the 1979 Master Manual. Both Blaske Marine Plaintiffs and Missouri argue that the Corps violates the ESA because the low summer flows set out in the 2003 Amended BiOp eliminate some areas of shallow water habitat for the sturgeon in the lower Missouri River. They thus argue that this removal of habitat constitutes a "take" under the ESA. As noted above, however, because the Corps is operating the River pursuant to the 2003 Amended BiOp and the ITS, it has an absolute defense to any Section 9 claim. 16 U.S.C. § 1536(o). Blaske Marine Plaintiffs and Missouri argue that the ITS does not apply to the elimination of habitat on the lower Missouri River, because the ITS does not specifically reference and connect reduced spawning to reduced downstream water flows, and therefore the Corps cannot use the ITS as a defense to a claim based on this situation. The ITS anticipates a loss in spawning and nursery habitat "because of significantly reduced sediment transport and deposition." (FWS AR

1457 at 33784.) The complete language of the ITS, however, establishes that the decrease in downstream water flow affects the transport and deposition of sediment in the lower Missouri River, thereby affecting the habitat of the sturgeon in this point of the River. *Id.* Thus, the ITS addresses the effect on the sturgeon in the lower Missouri River, and provides an absolute defense to this ESA claim.

Even without this defense, however, there is no violation of the ESA. Blaske Marine Plaintiffs and Missouri fail to demonstrate that low summer water flows result in a "take" of the sturgeon. They argue that the low summer flows significantly modify or degrade the habitat, which actually kills or injures the sturgeon. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 697 (1995). Though the parties concede that lower flows decrease shallow water habitat in this particular area of the river, Blaske Marine Plaintiffs and Missouri fail to set forth any evidence that this habitat modification actually causes any injury to the sturgeon. Blaske Marine Plaintiffs and Missouri fail to acknowledge that the FWS considered this argument in the 2003 Amended BiOp, and concluded that although lower summer flows may result in a reduction of shallow water habitat in the lower Missouri River, there is no evidence that such action will actually kill or injure the sturgeon. (FWS AR 1457 at 33784.) Blaske Marine Plaintiffs and Missouri fail to consider the effects on the sturgeon of increasing water flows on other areas of the river. Moreover, the slight reduction in habitat in the lower river does not negate the fact that the 2003 Amended BiOp results in an overall net gain in the amount of shallow water habitat on the Missouri River. In fact, lower flows in the 2003 RPA reduce habitat in the lower Missouri River by approximately 200 acres compared to the

1979 Master Manual RPA, while the overall increase of shallow water habitat on the entire Missouri River under the 2003 RPA compared to the 1979 Master Manual RPA is approximately 1,189 acres. (FWS AR 1291 at 31077, 31079.) Absent some evidence that injury will result to the sturgeon, Blaske Marine Plaintiffs and Missouri's Motions on this point are denied.

Similar to the argument advanced by the Nebraska Parties, Missouri also argues that the 2003 Amended BiOp and RPA are invalid because the FWS and the Corps improperly consulted under the ESA. Missouri also submits that the RPA is invalid because it requires the Corps to violate the FCA by not maintaining minimum flows. As the Court has previously indicated, the FCA does not impose a non-discretionary duty to maintain minimum navigation flows, so these arguments fail.

Missouri further claims that the mandatory language in the 2003 RPA is an attempt by the FWS to supercede the Corps' authority and to "govern the way that the Corps manages the River system." The Court is unpersuaded by this argument. Missouri fails to cite to any legal authority that indicates that the existence of mandatory language in a RPA invalidates it as a matter of law. Moreover, absent any evidence that either the FWS intends to bind the Corps to its RPA or that the Corps considers itself bound by the FWS's RPA, this argument fails.

4. Conclusion

The Court finds that the 2003 Amended BiOp and RPA are not arbitrary and capricious and thus are in accord with the ESA. Likewise, the 2004 Master Manual, 2004 AOP, and ROD do not violate the ESA.

C. National Environmental Policy Act Claims

NEPA requires that federal agencies prepare an Environmental Impact Statement ("EIS") for every "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *See* 42 U.S.C. §§ 4321-4370d. An EIS must examine: (1) the environmental impacts of the proposed action; (2) the adverse environmental effects of the action that cannot be avoided; (3) alternatives to the proposed action; (4) the relationship between local, short-term uses of the environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitment of resources that would be involved. 42 U.S.C. § 4332(2)(C). Once the EIS is completed, the agency must prepare a ROD. The Court reviews under NEPA "to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97-98 (1983). NEPA ensures that the Corps' actions are procedurally valid.

The Corps originally considered the impacts of seven alternatives submitted by different parties. (Final EIS at 4-3 to 4-11; 5-1 to 5-168.) Then, the Corps conducted a detailed analysis of five different alternatives to the 1979 Master Manual: (1) the Modified Conservation Plan ("MCP"), which includes increased drought conservation measures, unbalanced storage among the three upper and largest lakes in the Mainstem Reservoir System, and a Fort Peck spring rise approximately every third year; (2)

GP1528,[6] which includes a 15 Kcfs spring rise release from mid-May to mid-June followed by a minimum service flat release of 28 Kcfs that ends on September 1; (3) GP2021, which has a 20 Kcfs spring rise followed by a 25 Kcfs release to mid-July when the release drops to a low of 21 Kcfs until mid-August, when it returns to 25 Kcfs until September 1; (4) GP1521, which has a 15 Kcfs spring rise release from mid-May to mid-June followed by a release of 21 Kcfs; and (5) GP2028, which has a 20 Kcfs spring rise followed by a 28 Kcfs release to mid-May to mid-June followed by a release of 28 Kcfs. (Final EIS at 6-3.) Out of these five alternatives, the Corps eventually identified a Preferred Alternative ("PA") that included "more stringent drought conservation measures, a more defined methodology for unbalancing the upper three lakes, higher non-navigation season flows, and a planned re-evaluation in 3 years." (*Id.* at 8-1.) The 2004 Master Manual and 2004 AOP thus evolve from this PA.

1. Missouri

Missouri argues that Federal Defendants violated NEPA because the adoption of "adaptive management" process is improper, and the economic analysis used by the Corps in choosing the PA is flawed and misleading. Missouri fails to demonstrate that the Federal Defendants' decisions were arbitrary and capricious.

The Final EIS and the 2004 Master Manual describe the "adaptive management" process. Adaptive management is an approach to natural resources management, in

[6] "GP" means "Gavins Point" and the two numbers that follow correspond to the spring release and summer release, respectively.

which policy choices are made incrementally. As each choice is made, data on the effects of these choices are collected and analyzed in order to assess whether to retain, reverse, or otherwise alter the policy choice. Missouri maintains that this adaptive management approach violates NEPA because it permits the Corps to circumvent the NEPA process when policy choices are modified. Missouri takes issue with the potential flow changes that the Corps may undertake in the future. Missouri fails to point to any evidence that indicates that the Corps intends to avoid its NEPA obligations by implementing this adaptive management approach. To the contrary, the Corps acknowledges that in the event a major policy change results, the Corps will be required to comply with NEPA. (Final EIS at D1-69; Corps AR 1970 at 3.) Absent evidence that the adaptive management process actually results in the Corps' evasion of NEPA obligations, the Court declines to declare this approach invalid.

Missouri also argues that the Final EIS is flawed because it incorrectly calculated the value of benefits to navigation and downstream water supply resulting from the adoption of the RPA. Missouri essentially contends that it is impossible for any increased economic benefit to result to navigation and downstream water supply as a result of lower downstream water flows. Missouri disagrees with the Corps' conclusions, but fails to demonstrate why the Corps' analysis is arbitrary and capricious. The Corps comparatively evaluated the economic effects of the PA to the 1979 Master Manual on a variety of different river interests, including navigation and water supply. (*See* Final EIS 8-10 to 8-49.) The Final EIS was based on the previous draft EIS and its comments, as well as other economic studies. Missouri may disagree with the Corps'

conclusions and its rationale, but that is insufficient to argue that the Corps failed to take a "hard look" at the economic impact of its decision. *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999) The Corps articulates a rational basis for its conclusions. Missouri's disagreement with the Corps' conclusions is insufficient to render the Final EIS arbitrary and capricious.

2. Blaske Marine and MO-ARK

The 2004 AOP requires that the Corps restrict summer flows from Gavins Point to 25 Kcfs for a period of 30 days beginning July 1, 2004. If the Corps develops 1200 acres of shallow water habitat by July 1,[6] the Corps may engage in another consultation with the FWS to determine how much higher it can adjust summer flows.[7] Blaske Marine and MO-ARK (collectively, "Blaske Marine Plaintiffs") assert that the Corps must prepare a supplemental EIS discussing the impacts of operating under such conditions.[8] Blaske Marine Plaintiffs also argue that the

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[6] Federal Defendants represented to the Court at oral argument on May 21, 2004, that the Corps fully intended to successfully complete this habitat construction by July 1, and that the current status of the construction was on track for such completion. On June 14, 2004, Federal Defendants informed the Court that construction was complete and that consultation between the FWS and Corps had begun. The FWS anticipates that it will issue an opinion relating to 2004 summer flows on June 22, 2004.

[7] Any claims relating to the outcome of this consultation between the FWS and Corps are not ripe for review.

[8] Blaske Marine Plaintiffs failed to include this claim in their Complaint. Consistent with the Court's oral ruling on May 21, 2004, the Court permits Blaske Marine Plaintiffs to amend their Complaint to include this claim.

default water flow plan set for March 2006 contained in the 2003 RPA requires a supplemental EIS.

The 2003 Amended BiOp proposes a flow of 25 Kcfs for 30 days beginning July 1, 2004. The 2004 AOP implements this alternative. The Final EIS issued on March 5, 2004, evaluated the effects of summer flows at 21 Kcfs and at 28.5 Kcfs. (Final EIS Table 7-1.) The Final EIS does not specifically evaluate the effects of flows at 25 Kcfs. However, flows at 25 Kcfs are within the range of alternatives evaluated by the Corps. The purpose of the Final EIS is to ensure that the Corps takes a "hard look" at the environmental consequences of a project before taking a major action. *Friends of the Boundary Waters Wilderness,* 164 F.3d at1128. An EIS must discuss alternatives to the proposed action, and the sufficiency of the range of alternatives evaluated is subject to the "rule of reason." *Id.* The "rule of reason" requires the Court to determine whether the Corps has complied with the Final EIS in good faith, and whether the Final EIS "sets forth sufficient information to allow the decision-maker to consider alternatives and make a reasoned decision after balancing the risks of harm to the environment against the benefits of the proposed action." *Id.* The Final EIS need not be exhaustive. *Id.* The Court finds that although the Final EIS did not specifically evaluate summer flows at 25 Kcfs, the range of alternatives discussed in the Final EIS encompassed such flows. Thus, the Final EIS sufficiently examined summer flows at 25 Kcfs.

In conjunction with these flow levels, the Corps anticipates that it will complete construction of 1200 acres of shallow water habitat by July 1, 2004. Blaske Marine Plaintiffs contend that construction of this habitat requires a supplemental EIS. In both the 2000 BiOp and the

2003 Amended BiOp, the FWS set a goal to develop twenty to thirty acres of shallow water habitat per mile of the Missouri River. From years 2000 to 2020, 20,000 acres of shallow water habitat must be developed. Low summer flows help to develop shallow water habitat, but not at the level required to protect the sturgeon. The FWS concluded that a multi-faceted approach was necessary to achieve its goals: reservoir operational changes, structural modifications, and non-structural modifications. The FWS determined that 4900 acres of shallow water habitat results from flows at 21 Kcfs for a period from mid-July to mid-August, while 3,717 acres of shallow water habitat results from full navigation flows of 34.5 Kcfs from mid-July to mid-August. The difference between shallow water habitat construction at low flows and at full navigation flows is thus 1200 acres. If the Corps artificially constructs 1200 acres of shallow water habitat by July 1, depending on its consultations with the FWS, it may operate at possibly full navigation flows because the 1200 acres of artificial habitat construction will compensate for the smaller levels of shallow water habitat construction at full navigation flows. Both the 2000 BiOp and the 2003 Amended BiOp contemplate that artificial habitat construction is necessary to maintain sufficient shallow water habitat. The Final EIS also acknowledges that artificial shallow habitat construction is needed to provide enough shallow water habitat. (Final EIS 7-71.) Moreover, Blaske Marine Plaintiffs fail to demonstrate that this shallow water habitat construction is a "major Federal action[] significantly affecting the quality of the human environment," or that a categorical exclusion does not apply. 42 U.S.C. § 4332; 62

Fed. Reg. 2375, 2381 (Jan. 16, 1997).[9] This failure is fatal to the claim that the FWS must issue a supplemental EIS.

Blaske Marine Plaintiffs also argue that the proposed default water plan that may potentially take effect in March 2006, requires a supplemental EIS. The proposed default water plan was not evaluated nor considered under the Final EIS. This default plan takes effect in 2006 only if the Corps fails to develop "a flow management plan . . . [that] provide[s] a spring rise and summer flow which will provide for the life history needs of the pallid sturgeon." (FWS AR 1457 at 33761.) Because neither the default plan nor any future plan were evaluated under any of the alternatives contained in the Final EIS, further NEPA analysis may be required.[10] 40 C.F.R. § 1502.9(c)(1) (supplemental EIS required when the "agency makes substantial changes in the proposed action that are relevant to environmental concerns," or when there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts"). However, this issue is not yet ripe for the Court's review.

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[9] The Court further notes, based on representations by the Federal Defendants that 1200 acres have been created, that Blaske Marine Plaintiffs' claim on this point is likely moot. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. ___, 2004 WL 1301302 (June 14, 2004) (supplemental EIS not required if "major" federal action already completed); (*Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1988) (dismissing plaintiffs' NEPA claim because ordering compliance with NEPA would have no effect on the already-completed agency action).

[10] The Court does not intend to make any finding regarding the Corps' obligations under NEPA for this potential future action.

3. South Dakota

South Dakota argues that the Corps violated NEPA because it failed to consider the modified "Governors' Summit Proposal" (a.k.a. "Nebraska Proposal") in its analysis of drought conservation measures. South Dakota also contends that the Corps improperly considered the interests of the Mississippi River stakeholders in determining the preferred alternative for drought conservation. Finally, South Dakota contends that the Corps failed to consider shortening the navigation season in the spring rather than in the fall.

The Governors within the Missouri River basin held a summit meeting in September 2003 to discuss the conflict over river operations. A summit plan was created by those in attendance. Although this report was not specifically included in the Final EIS, the range of proposals considered by the Corps in the Final EIS encompassed the proposals in the Governor's Summit Proposal. For example, the Governor's Summit Proposal envisioned that operations would include low summer flows at 25 Kcfs. As previously discussed, the Final EIS contained an analysis of low summer flows of 21 Kcfs to 28 Kcfs, thus encompassing flows proposed in the Governor's Summit Proposal. The Corps is under no obligation to consider each and every alternative, but rather it must evaluate a considerable range of alternatives to allow it to "make a reasoned decision." *Friends of Boundary Waters Wilderness*, 164 F.3d at 1128. South Dakota fails to demonstrate that the Corps' alleged failure to specifically consider this report was arbitrary and capricious.

The Corps' consideration of the impact of the PA on the Mississippi River was not arbitrary or capricious.

NEPA requires that the agency evaluate all foreseeable impacts of a major federal action. The operation of the Missouri River impacts the operation of the Mississippi River. Moreover, South Dakota submits no legal authority to support its claim that the Corps evaluated too many considerations.

Finally, South Dakota's submits that the Corps acted arbitrarily and capriciously because it failed to adopt an alternative that shortened the navigation season in the spring, rather than the fall. According to South Dakota, shortening the navigation period in the spring preserves more water in the upstream reservoirs during the essential fish spawning period. However, the Corps points out that the greatest infusion of water occurs in the spring. If the Corps shortened the water season in the spring, it would do so without considering the water infusions from winter precipitation and spring flows. Failure to consider the spring infusion of water flow may result in an unnecessary shortening of the navigation season. The decision to shorten the fall navigation season is made by July 1 of each navigation year, which allows affected parties to adjust their operations and interests accordingly. If the Corps shortens the spring navigation season in March, the decision to shorten the spring season would have to be made in December, when it is impossible to judge future water conditions. South Dakota fails to establish that the Corps' alleged failure to consider this alternative is arbitrary or capricious. South Dakota's claims fail.

4. American Rivers

American Rivers asserts that the Corps violated NEPA because it selected a PA without "adequate explanation."

(Am. Rivers Mem. in Opp'n to FCA/NEPA claims at 4.) American Rivers contends that the Corps failed to explain why the PA it selected was superior to the other evaluated alternatives, in particular GP2021, and thus that the Corps' decision is arbitrary and capricious.

NEPA only requires that the Final EIS demonstrate that the agency in good faith objectively has taken a "hard look" at the environmental consequences of a proposed action and alternatives. *Friends of the Boundary Waters Wilderness*, 164 F.3d at 1128. The Final EIS must provide sufficient detail to permit those who did not participate in its preparation to understand and consider the relevant environmental influences involved. Finally, an agency's consideration of alternatives need only be reasonable. *Id.*[11]

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[11] Under NEPA, the agency:

> should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public. . . . [A]gencies shall: (a) rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated; (b) devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits; (c) include reasonable alternatives not within the jurisdiction of the lead agency; (d) include the alternative of no action; (e) identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference; and (f) include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1502.14.

The Corps evaluated the five alternatives under four objectives, to select the PA that:

> (1) serve[d] the contemporary needs of the Missouri River Basin and the Nation; (2) complie[d] with environmental laws, including the [ESA]; (3) serve[d] Congressionally authorized project purposes; and (4) fulfill[ed] the Corps' responsibilities to Federally recognized Tribes.

(Final EIS at 8-1.) The Corps ultimately selected a PA that best met these objectives:

> The rationale for selecting the PA is a composite of analyses, information briefings, technical expertise, and comments concerning the resources evaluated as part of the Study. The Corps believes that the PA, when combined with other measures . . . conserves more water in the upper three lakes during extended droughts, meets the needs of ESA-listed fish and wildlife species, is consistent with the Corps' responsibilities under environmental laws and Tribal trust responsibilities, and provides for the Congressionally authorized uses of the system.

(*Id.* at 8-4.) In selecting this PA, the Corps conducted a detailed analysis of all five alternatives and the 1979 Master Manual, in the areas of (1) hydrology; (2) water quality; (3) sedimentation, erosion and ice processes; (4) economic effects; and (5) environmental effects. (*Id.* at 7-1 to 7-256.) The Final EIS presents an analysis pertaining to each criteria in comparative form. (*Id.*) The Final EIS then describes the PA, the effects of the PA, and directly compares the PA to the MCP alternative and the 1979 Master Manual. Although the PA is not directly compared to GP2021, American Rivers fails to cite any legal authority to support the assertion that such a comparison is

required. Moreover, American Rivers fails to demonstrate why the detailed analyses and comparisons included in Chapter Seven of the Final EIS are insufficient under NEPA. The Court thus finds that the Corps' decision to implement the PA was made in good faith after proper consideration of the alternatives, and is therefore reasonable and complies with NEPA.

5. Conclusion

Federal Defendants' Motion for Summary Judgment on NEPA claims is granted. The Motions by Missouri, Blaske Marine Plaintiffs, South Dakota, and American Rivers are denied.

D. Collateral Claims

1. Mandan, Hidasta, and Arikara Nation

The Nation claims that Federal Defendants must operate the River in a manner that: (1) best protects Tribal trust assets and advances economic self sufficiency of the Nation and its members; (2) avoids adverse impacts to federally protected cultural resources and burial sites; and (3) assures the low-income residents of the Fort Berthold Indian Reservation that their recreation and fishing economies will not disproportionally suffer. The Nation also requests that the Court direct Federal Defendants to identify and transfer excess project lands at Lake Sakakawea to the Nation and neighboring entities.[12] Federal

[12] The Nation originally pursued a claim under North Dakota's Clean Water Act. As a result of this Court's order in *North Dakota v. U.S. Army Corps of Eng'rs*, Civil File No. 03-4288, 03-MD-1555 (Apr.

(Continued on following page)

Defendants claim that the Nation lacks Article III standing.

The jurisdiction of the federal courts is limited to cases or controversies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). Among other constitutional minimums, a "case or controversy" requires the plaintiff to have standing to litigate the action. Standing burdens the plaintiff to demonstrate: (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) that a favorable court decision can redress the injury. *Id.*

The Nation seeks an order directing the Corps to consider certain tribal interests and to operate the River in a particular way. However, the Nation fails to articulate any injury in fact. The Nation has failed to establish either a concrete and particularized injury, or actual or imminent injury. *See Id.* Although the Nation clearly identifies its concerns and its particular interest in River operations, it fails to indicate how the 2004 Master Manual and 2004 AOP or any other action of the Federal Defendants have resulted or will result in injury. "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984). Because the Nation has failed to articulate any injury in fact, the Nation lacks standing and its Amended Complaint must be dismissed.

12, 2004) (PAM), the Nation and the Corps stipulated to dismissal of Count III of the Nation's Complaint.

2. Blaske Marine Plaintiffs

Blaske Marine Plaintiffs have asserted collateral claims that challenge: (1) the stocking of non-native and native fish in the Missouri River; (2) the final rule published by the FWS designating a critical habitat for the piping plover; and (3) Federal Defendants' compliance with the Information Quality Act ("IQA").

a. Fish Stocking Claims

Blaske Marine Plaintiffs assert that the stocking of fish by Montana, North Dakota, South Dakota ("the States") and the FWS, "may or will have" adverse effects on the pallid sturgeon and the environment, in violation of the ESA. (Blaske Marine Pls.' Mem. in Supp. of Mot. on Eighth Claim for Relief at 2.) Blaske Marine Plaintiffs contend that the States and the FWS violated NEPA by failing to prepare an EIS on the fish stocking program because of these possible effects.[13]

The States have programs that stock fish in the Missouri River and its mainstem reservoirs. The States receive federal funding for these programs. (FWS Fish Stocking ("FS") AR 38 at 936.) The FWS also provides stocking fish from its own hatcheries to the States. Fish

[13] Blaske Marine Plaintiffs also allege that the States and the FWS's fish stocking violates Section 9 of the ESA, because it "takes" the sturgeon. Both FWS and the States have filed substantive Motions against Blaske Marine Plaintiffs on this issue, to which Blaske Marine Plaintiffs failed to respond. Because Blaske Marine Plaintiffs fail to demonstrate that the stocking of fish in mainstem reservoirs constitutes a "take" of the sturgeon, both FWS's and the States' Motions must be granted on this point.

stocked include native and non-native species. The non-native species include chinook salmon, rainbow trout, rainbow smelt and walleye. (FWS FS AR 102.) Blaske Marine Plaintiffs contend that the FWS failed to comply with NEPA because it did not prepare an EIS on fish stocking. FWS argues that an EIS was unnecessary, because a categorical exclusion applied.[14]

Under NEPA, an EIS is not necessary when the action in question falls within a categorical exclusion established through the agency's own NEPA implementation procedures. 40 C.F.R. § 1501.4(a)(2). A categorical exclusion does

[14] Although the Court concludes that the FWS was not legally required to prepare an EIS with respect to fish stocking, the Court notes that Blaske Marine Plaintiffs' standing to raise this claim is questionable. NEPA challenges under the APA require Blaske Marine Plaintiffs to demonstrate that their alleged injuries fall within the zone of interests that NEPA is designed to protect. NEPA's broad purpose is to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. Blaske Marine Plaintiffs are downstream interests with concerns focused on the level of downstream water flows. Most, if not all, of the organizations represented by Blaske Marine Plaintiffs, allege economic injury from lower downstream flows. Federal Defendants and the States present a persuasive argument that Blaske Marine Plaintiffs' injury from fish stocking activities is solely economic in nature, and therefore not protected by NEPA. However, Blaske Marine Plaintiffs do allege that maintaining higher water levels in upstream reservoirs to support fish stocking activities causes harm to the environment by reducing habitat for the plover and the tern. Blaske Marine Plaintiffs thus assert that their interests are not purely economic. Parties motivated in part by the protection of their own economic interests may challenge agency action so long as their environmental interests are not so insignificant that they should be disregarded altogether. *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002). Though the Court finds Blaske Marine Plaintiffs' connection to environmental injury attenuated at best, the Court will presume that Blaske Marine Plaintiffs have standing and will consider the merits of this claim.

not "individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations." 40 C.F.R. § 1508.4. Under its NEPA implementation procedures, the FWS concluded that a categorical exclusion applied, rendering an EIS relating to fish stocking unnecessary. *See* 62 Fed. Reg. 2375, 2381 (Jan. 16, 1997) (defining categorical exclusions). The Court reviews an agency determination that an action falls within a categorical exclusion under the arbitrary and capricious standard. *Friends of Richards-Begaur Airport v. F.A.A.*, 251 F.3d 1178, 1187 (8th Cir. 2000). Blaske Marine Plaintiffs contend that the FWS's determination that a categorical exclusion applied was arbitrary and capricious because of the past and potential harm such stocking has on the pallid sturgeon and the environment.

Blaske Marine Plaintiffs rely heavily on a report prepared by Dr. Harold Tyus.[15] (*See* FWS FS AR 92.) In that report, Dr. Tyus comments on the possibility that non-native fish adversely affect the sturgeon. This report is broad and generalized, fails to indicate which non-native fish adversely affect the sturgeon, and does not connect the fish stocking activities of the States or the FWS to the

[15] The States have filed a *Daubert* Motion to exclude this extra-record submission, as well as the other exhibits accompanying Blaske Marine Plaintiffs' Motion. The Federal Defendants have also filed a Motion to Strike this evidence, to the extent that it is not part of the administrative record. Blaske Marine Plaintiffs submit that because the relief they seek is prospective in nature, the Court is entitled to look at extra-record evidence. The Court finds that argument unpersuasive. Even so, the Court declines to address the Motion to Strike or the *Daubert* Motion, as Dr. Tyus's report is properly part of the administrative record.

alleged harm. Blaske Marine Plaintiffs' reliance on Dr. Tyus's report is unpersuasive.

The record establishes that the FWS's decision to apply a categorical exclusion is not arbitrary nor capricious. The sturgeon was originally listed as threatened because of "habitat modification, apparent lack of natural reproduction, commercial harvest, and hybridization in part of its range," not for reasons related to fish stocking. (FWS FS AR 5.) Moreover, the record supports that the FWS considered many possible effects of fish stocking on the sturgeon, including predation and competition, and concluded that fish stocking activities would not adversely affect the sturgeon. (FWS FS AR 19 at 410-412; *Id.* 38 at 936-937; *Id.* 62 at 1833-1834.) The record simply does not support Blaske Marine Plaintiffs' assertion that a "significant" effect will result either on the environment or the pallid sturgeon as a result of fish stocking activities. The FWS's application of a categorical exclusion is therefore not arbitrary and capricious. Blaske Marine's Motion for Summary Judgment thus fails.[18]

b. Critical Habitat Claims

In 2002, the FWS designated the critical habitat for the piping plover. Blaske Marine Plaintiffs contend that this critical habitat designation violates the ESA, NEPA,

[18] Because this claim against the FWS fails, it likewise fails against Montana, North Dakota and South Dakota. Even so, the States are not proper parties for this NEPA claim. Blaske Marine Plaintiffs argue that NEPA was violated because an EIS was not issued on fish stocking. However, the FWS, not the States, is responsible for EIS determinations, and therefore Montana, North Dakota and South Dakota are inappropriate defendants for this claim.

the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), and the notice and comment procedures of the APA.

The ESA directs the Secretary of the Interior to list a particular species as endangered or threatened. It also directs the Secretary to designate critical habitat "to the maximum extent prudent and determinable" at the time of the species listing. 16 U.S.C. § 1533(a)(3)(A). A critical habitat is the geographical area that the species occupies. The physical or biological features of the critical habitat are essential to the species' conservation and require special management or protection. *Id.* § 1532(5)(A)(i). The critical habitat designation must be made by relying on the best scientific data available, taking into consideration the economic impact and any other relevant impact of specifying an area a critical habitat. *Id.* § 1533(b)(2).

i. ESA Claims

Blaske Marine Plaintiffs argue that the FWS violated the ESA because it failed to properly consider the economic and other impacts resulting from the designation of the plover's critical habitat, and then failed to properly balance these impacts against the benefits of the habitat designation. Blaske Marine Plaintiffs specifically contend that the FWS should have excluded a small area in its habitat designation below Fort Randall and Gavins Point.

Blaske Marine Plaintiffs do not have standing to raise this claim. Blaske Marine Plaintiffs allege that their economic interests, such as power production and regional transportation, suffer because of the lack of downstream water flow. Blaske Marine Plaintiffs submit that the FWS failed to consider these economic factors and impacts in

the plover's critical habitat designation, and thus failed to exclude the area below Fort Randall and Gavins Point from the plover's critical habitat. However, Blaske Marine Plaintiffs fail to indicate how excluding this area from critical habitat redresses their alleged injuries resulting from decreased downstream water flows. Even if this area were excluded from critical habitat, Blaske Marine Plaintiffs provide no evidence that this exclusion would increase downstream water flows or somehow redress their alleged injuries. Irrespective of critical habitat designation, the Corps is still required to maintain water flows to comply with its other legal obligations. Blaske Marine Plaintiffs fail to establish that impairment of their interests are actually attributable to the critical habitat designation. Thus, Blaske Marine Plaintiffs lack standing to challenge the critical habitat designation of the plover under the ESA.

Even if Blaske Marine Plaintiffs had standing, however, the Court finds that the FWS sufficiently considered all economic factors and impacts, and properly balanced these impacts in its designation. In *New Mexico Cattle Growers Assoc. v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001), the Court required that the FWS examine all economic impacts of the critical habitat designation, irrespective of whether such impacts were co-extensive with other causes. *Id.* at 1283. In this case, in its economic analysis, the FWS expressly acknowledged its duties under *New Mexico Cattle Growers*. (FWS Critical Habitat ("CH") AR 5-2584 at 13368, 13397.) The analysis considered and evaluated both impacts associated with listing the plover under the ESA and impacts related to the designation of the critical habitat, as well as impacts attributable to other causes. (FWS CH AR 5-2584.) The

FWS ultimately concluded that the benefits of excluding the area below Fort Randall and Gavins Point did not outweigh the benefits of designating such an area as critical habitat. (FWS CH AR 5-2584.) The Court finds that the FWS did not act arbitrarily or capriciously in designating critical habitat for the plover.[17]

ii. NEPA Claims

Blaske Marine Plaintiffs submit that the critical habitat designation is flawed because the FWS failed to follow NEPA procedures in the designation.[18] Under NEPA and its corresponding regulations, an agency may prepare an Environmental Assessment ("EA") in lieu of an EIS, as long as the agency's proposed action does not clearly require an EIS. 40 C.F.R. § 1501.4(a)-(b); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. ___, 2004 WL 1237361 at 3 (June 7, 2004). If the agency concludes that an EIS is not required, then it must issue a "finding of no significant impact" ("FONSI") that describes why the proposed action

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[17] Blaske Marine Plaintiffs alternatively submit that the FWS designated critical habitat although it had insufficient information to make such a determination. However, the FWS points out that the designation in this instance was pursuant to Court order, and that it was based on the best scientific information available at that time. *See* 67 Fed. Reg. 57638, 57642.

[18] Whether NEPA procedures must be followed for the designation of critical habitat is an issue of first impression in the Eighth Circuit. In *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit determined that a NEPA analysis is not required, while in *Catron County Bd. of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996), the Tenth Circuit held otherwise. Because the Court finds that the FWS complied with NEPA, it declines to evaluate whether the FWS is required to comply with NEPA in a critical habitat designation.

will not significantly impact the human environment. 40 C.F.R. §§ 1501.4(e), 1508.13. In this case, the FWS conducted an Environmental Assessment ("EA") that evaluated four different alternatives, published the EA for public review and comment, and thereafter issued a FONSI for the plover's critical habitat designation.

An agency's decision not to prepare an EIS will be set aside only if its decision is arbitrary and capricious. 5 U.S.C. § 706(2)(A); *Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835, 838 (8th Cir. 1995). The Court considers four factors to determine whether the FWS's decision not to prepare an EIS is arbitrary and capricious: (1) whether the FWS took a "hard look" at the problem; (2) whether the FWS identified the relevant areas of environmental concern; (3) whether the FWS made a convincing case that the impact was insignificant; (4) if there was impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum. *Earth Protector, Inc. v. Jacobs*, 993 F. Supp. 701, 706 (D. Minn. 1998) (Tunheim, J.) (citing *Audubon Soc'y of Cent. Ark. v. Dailey*, 977 F.2d 428, 434 (8th Cir. 1992)). The Court must determine if the FWS made a clear error in judgment. *Id.*

Blaske Marine Plaintiffs submit that the FWS should have prepared an EIS because the impacts on the human environment are "significant." The FWS is required to evaluate both the context and intensity to determine whether the critical habitat designation will have significant impacts. 40 C.F.R. § 1508.27. "Intensity" refers to the severity of the impact, which can be evaluated by considering ten different factors. *Id.* Blaske Marine Plaintiffs contend that the mere existence of any of these factors is sufficient to render the impact "significant." The Court

disagrees. As required by the regulations, the EA considered all ten factors, and concluded that any impact would be minimal. (FWS CH AR 1-111 at 1817-18.) Blaske Marine Plaintiffs fail to demonstrate how any of the alleged "plethora" of impacts are significant under NEPA. Blaske Marine Plaintiffs' argument on this point fails.

Blaske Marine Plaintiffs further argue that the FWS failed to consider any effects the critical habitat designation had on the human environment. The Court disagrees. The EA addressed impacts on fish and wildlife, recreation, agriculture (including farming and grazing), water management, and socioeconomics such as property values. (FWS CH AR 1-111 at 1805-16.) The EA also evaluated each of the ten intensity factors, and concluded that those impacts, including any on the human environment, would be minimal. Blaske Marine fails to demonstrate that the FWS's decision to issue an EA and FONSI instead of an EIS was an "error in judgment."

iii. Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act Claims

Blaske Marine Plaintiffs argue that the FWS's critical habitat designation violated the Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-12, and the Small Business Regulatory Enforcement Flexibility Act ("SBREFA"), 5 U.S.C. §§ 801-08. Generally, under RFA, a regulatory flexibility analysis must be prepared and made available for public comment on the impacts of the proposed rule. 5 U.S.C. §§ 603, 604. If the agency certifies that the rule will not have a significant impact on a substantial number of small entities, this analysis is not required. *Id.* § 605(b). In this case, the FWS certified that the critical habitat

designation would not have a significant impact on a substantial number of small entities. 67 Fed. Reg. 57638, 57676 (Sept. 11, 2002). This certification also set forth the rationale for its conclusion. *Id.* Blaske Marine Plaintiffs submit that this finding is arbitrary and capricious because it relies on the FWS's erroneous economic analysis. Because the Court concluded that the baseline in the economic analysis was not flawed, Blaske Marine Plaintiffs' argument on this point fails. (*See supra* Section D(2)(b)(iii).)

Under SBREFA, before a rule can take effect, the FWS is required to submit to Congress a report containing a copy of the rule, a general statement relating to the rule, including whether it is a major rule, and the proposed effective date of the rule. 5 U.S.C. § 801(a)(1)(A). A "major rule" is one that will likely result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal state, or local government agencies, or geographic regions; or (3) any significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the domestic enterprises to compete with foreign enterprises in domestic and export markets. 5 U.S.C. § 804(2). The FWS determined that the designation of the plover's critical habitat was not a major rule under § 804(2). 67 Fed. Reg. 57638, 57677 (Sept. 11, 2002). Under SBREFA, this determination is not subject to judicial review. 5 U.S.C. § 805. Even so, there is no evidence that the FWS's decision was arbitrary and capricious. Blaske Marine Plaintiffs' claims under RFA and SBREFA fail.

iv. APA Claims

Blaske Marine Plaintiffs also assert that the final rule issued by the FWS for the critical habitat designation deviated so much from the proposed rule that it violated 5 U.S.C. § 553 by failing to provide for additional public review and comment. The FWS submits that the final rule was a "logical outgrowth" of the proposed rule and therefore, an insufficient deviation to warrant additional review and comment.

The APA requires that an agency allow for public comment and review in its rule making procedures. 5 U.S.C. § 553.

> A final rule which contains changes from the proposed rule need not always go through a second notice and comment period. An agency can make even substantial changes from the proposed version, as long as the final changes are in character with the original scheme and a logical outgrowth of the notice and comment. The essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan. [The Court] must be satisfied, in other words, that given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticisms which the Agency might find convincing. Thus, where the final rules are a result of a complex mix of controversial and uncommented upon data and calculations, remand may be in order.

Natural Res. Def. Council, Inc. v. E.P.A., 824 F.2d 1258, 1283 (1st Cir. 1987) (citations and quotation omitted). Blaske Marine Plaintiffs contend that the final rule acknowledges economic impacts that the proposed rule did

not address, and that the final rule is so significant a deviation that it warrants an additional comment and review period. The Court finds Blaske Marine Plaintiffs' argument unpersuasive and unsupported by the record. As the FWS points out, the proposed rule recognized that the critical habitat designation would result in minimal economic impacts. (FWS CH AR 5-2584.) Although the final rule further detailed these economic impacts, the Court does not find that these extensions are not in "character" with the proposed rule. Blaske Marine Plaintiffs further fail to indicate that any of their potential comments would have offered new or different criticisms that the FWS might have found convincing. Thus, the Court finds that the FWS did not violate the APA by failing to provide an additional comment period for the critical habitat designation.

c. Information Quality Act Claims

Blaske Marine Plaintiffs also claim that Federal Defendants have violated the Information Quality Act ("IQA"), 35 U.S.C. § 3516. Specifically, they argue that Federal Defendants failed to comply wi their request for "information and science" regarding the augmented spring pulse and proposed default flow plan scheduled for March 2006. However, the language of the IQA indicates that the Court may not review an agency's decision to deny a party's information quality complaint.

The IQA does not provide for a private cause of action, and Blaske Marine Plaintiffs seek judicial review under the APA. Federal Defendants dispute that the APA can be invoked, claiming that there is no law for the Court to apply. Generally, the APA permits the Court to review an

agency action. 5 U.S.C. § 702. However, if an agency action is committed to agency discretion by law, the Court is not entitled to conduct any review. 5 U.S.C. § 701(a)(2). If a statute is "drawn in such broad terms" that "there is no law to apply," then the agency action is committed to agency discretion. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Although the IQA directs the Office of Management and Budget ("OMB") to issue guidelines that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by the agency, the plain language of the legislation fails to define these terms. 44 U.S.C. § 3516. Moreover, the history of the legislation fails to provide any indication as to the scope of these terms. Absent any "meaningful standard" against which to evaluate the agency's discretion, the Court finds that Congress did not intend the IQA to provide a private cause of action, and therefore Blaske Marine Plaintiffs' IQA claim fails.

CONCLUSION

"Man cannot exercise control over the weather." S. Doc. No. 78-191, at 17 (1944). In an attempt to control the effects of the weather, Congress enabled government agencies to regulate the operation of the Missouri River. In a perfect world, such regulation would adequately provide for all competing river interests regardless of the weather, while simultaneously protecting and preserving the environment and the species it harbors. The Corps and its corresponding government agencies have the insurmountable task to achieve this illusory perfection.

The Court commends the parties for vigorously advocating their positions. However, it is for this reason that Congress delegated Missouri River operations to the Corps. The Missouri River cannot be operated in a vacuum, but rather the Corps must consider, evaluate, and balance all interests in its operation of the Missouri River. This obligation is further compounded by the uncertainty of the weather and its unpredictable effect on river conditions. It is inevitable that the Corps' decisions will not be perfect, as evidenced by this extensive litigation. But, the "standard for agency action is not one of perfection." *Central South Dakota Co-op. Grazing Dist. v. Dep't of Agric.*, 266 F.3d 889, 901 (8th Cir. 2001).

Moreover, a guiding principle behind the APA is to "protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. ___, 2004 WL 1301302, at *7 (June 14, 2004). While the Court acknowledges the competing interests of the parties, the Court finds that the Federal Defendants have not acted arbitrarily and capriciously throughout their development of the 2004 Master Manual and 2004 AOP. Therefore, the 2004 Master Manual and 2004 AOP are valid, and the Corps must operate the Missouri River accordingly.

Accordingly, based on all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

A. Federal Defendants' Motion for Summary Judgment on FCA and NEPA Claims (Clerk Doc. No. 245) is **GRANTED**;

B. Federal Defendants Motion for Summary Judgment on ESA Claims (Clerk Doc No. 242) is **GRANTED**;

C. Federal Defendants' Motion for Summary Judgment on Blaske Marine Plaintiffs' Collateral Claims (Clerk Doc. No. 252) is **GRANTED**;

D. Federal Defendants' Motion for Summary Judgment on the Claims by the Mandan, Hidasta and Arikara Nation (Clerk Doc. No. 339) is **GRANTED**; and

E. All other pending Motions are **DENIED** as moot.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 21, 2004

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District
Court Judge

58 STAT.] 78TH CONG., 2D SESS. –
CHS. 662-665 – DEC. 22, 1944

* * *

[CHAPTER 665]

AN ACT

Authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

In conformity with this policy:

(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized,

shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters rising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or

proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to

the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9(a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3(a) of the Act of August 11, 1939 (53 Stat. 1418), as amended, are hereby amended accordingly.

SEC. 2. That the words "flood control" as used in section 1 of the Act of June 2, 1936, shall be construed to include channel and major drainage improvements, and that hereafter Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and water-flow retardation and soil-erosion prevention on watersheds shall be under the jurisdiction of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress.

SEC. 3. That section 3 of the Act approved June 22, 1936 (Public, Numbered 738, Seventh-fourth Congress), as amended by section 2 of the Act approved June 28, 1938 (Public, Numbered 761, Seventy-fifth Congress), shall apply to all works authorized in this Act, except that for

any channel improvement or channel rectification project provisions (a), (b), and (c) of section 3 of said Act of June 22, 1936, shall apply thereto, and except as otherwise provided by law: *Provided*, That the authorization for any flood-control project herein adopted requiring local cooperation shall expire five years from the date on which local interests are notified in writing by the War Department of the requirements of local cooperation, unless said interests shall within said time furnish assurances satisfactory to the Secretary of War that the required cooperation will be furnished.

SEC. 4. The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: *Provided*, That preference shall be given to Federal, State, or local governmental agencies, and licenses may be granted without monetary consideration, to such agencies for the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the public interest. The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and

regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and

privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 7. Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations: *Provided*, That this section shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the Lower Ohio and Mississippi Rivers the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio River in accordance with such instructions as may be issued by the War Department.

SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the

provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now exisiting [sic]: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the army engineers, which provides conservation storage of water for irrigation purposes.

SEC. 9. (a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent

Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

(d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior.

SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the

Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided*, That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further*, That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further*, That penstocks and other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.

* * *

78TH CONGRESS, 2d Session } SENATE { DOCUMENT No. 247

MISSOURI RIVER BASIN

REPORT

OF A

COMMITTEE OF TWO REPRESENTATIVES EACH FROM THE CORPS OF ENGINEERS, U. S. ARMY, AND BUREAU OF RECLAMATION, APPOINTED TO REVIEW THE FEATURES OF THE PLANS PRESENTED BY THE CORPS OF ENGINEERS (HOUSE DOCUMENT NO. 475) AND THE BUREAU OF RECLAMATION (SENATE DOCUMENT NO. 191) FOR THE COMPREHENSIVE DEVELOPMENT OF THE MISSOURI RIVER BASIN

Supplemental to Senate Document No. 191 and House Document No. 475, 78th Congress

(LOGO)

PRESENTED BY MR. O'MAHONEY

NOVEMBER 21, 1944. – Ordered to be printed

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1944

MISSOURI RIVER BASIN

OCTOBER 25, 1944.

To the SECRETARY OF WAR and the SECRETARY OF THE INTERIOR:

1. In view of the questions raised regarding the differences between the separate plans presented by the Corps of Engineers (H. Doc. 475, 78th Cong., 2d sess.) and the Bureau of Reclamation (S. Doc. 191, 78th Cong., 2d sess.) for the comprehensive development of the Missouri River Basin, a committee, composed of two representatives each from the Corps of Engineers and the Bureau of Reclamation, was appointed to review the engineering features of the two plans with a view of reconciliation between them.

2. The committee met at Omaha, Nebr., on October 16 and 17, 1944, discussed the various features of both plans, examined the supporting data for each plan, and prepared the enclosed joint engineering report. The joint engineering report points out that by making appropriate modifications it is possible to eliminate existing differences between the two plans.

3. It was possible to bring into agreement the plans of the Corps of Engineers and the Bureau of Reclamation by recognizing the following basic principles:

(*a*) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control and navigation.

(*b*) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.

(*c*) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with the other beneficial uses of water.

4. For convenience in referring to the joint engineering report the following comparable six subdivisions contained in the report of the Bureau of Reclamation, Senate Document 191, Seventy-eighth Congress, second session, have been used:

(*a*) Upper Missouri River Basin.

(*b*) Yellowstone River Basin.

(*c*) Missouri River – Fort Peck to Sioux City.

(*d*) Minor western tributaries.

(*e*) Niobrara, Platte, and Kansas Rivers.

(*f*) Lower Missouri Basin.

UPPER MISSOURI RIVER BASIN

5. The plan presented in House Document 475, Seventy-eighth Congress, second session, does not specifically designate any units in the upper Missouri River Basin subdivision, although provisions are made for desirable and necessary projects in this area. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, contemplates the construction of

19 reservoirs with a total storage capacity of 3,359,950 acre-feet for flood control, silt control, the development of hydroelectric power, the irrigation of 460,900 acres of new lands, and the provision of a supplemental water supply for 208,700 acres of land now being served with an inadequate water supply. There is no conflict in the proposed plans of the two agencies for the upper Missouri River Basin subdivision.

YELLOWSTONE RIVER BASIN

6. The plan presented in House Document 475, Seventy-eighth Congress, second session, provides for the construction of Boysen Reservoir with a storage capacity of 3,500,000 acre-feet and the Lower Canyon Reservoir with a capacity of 2,250,000 acre-feet to be operated for flood control, irrigation, navigation, power, and other purposes. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, provides for the construction of 27 reservoirs located on various streams in the Yellowstone River subdivision with a total storage capacity of 4,285,200 acre-feet; the reservoirs to be operated for flood control, silt control, the development of hydroelectric power, the irrigation of 509,560 acres of new lands, and the provision of a supplemental water supply for 204,500 acres of land now being served with an inadequate water supply. It was concluded that the plan described in Senate Document 191, Seventy-eighth Congress, second session, would be adequate to accomplish the objectives of the plan described in House Document 475, Seventy-eighth Congress, second session.

MISSOURI RIVER – FORT PECK TO SIOUX CITY

7. The plan presented in House Document 475, Seventy-eighth Congress, second session, contemplates the construction of five additional multiple-purpose reservoirs on the main stem of the Missouri River for flood control, navigation, irrigation, power, domestic and sanitary purposes, wildlife, and recreation, as shown in the following table:

Project	Location	Approximate gross storage capacity (acre-feet)
Garrison	Near Garrison, N. Dak	17,000,000
Oak Creek	Near Mobridge, S. Dak	6,000,000
Oahe	Near Pierre, S. Dak	6,000,000
Fort Randall	Near Wheeler, S. Dak	6,000,000
Gavins Point	Near Yankton, S. Dak	200,000

The plan also provides that as soon as substitute storage is built on the main stem of the river, the Fort Peck Reservoir will be operated as a multiple-purpose reservoir primarily in the interest of irrigation.

8. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, contemplates the use of Fort Peck Reservoir primarily for irrigation purposes, also for navigation, flood control, silt control, and power, and the construction of main stem reservoirs to be operated for flood control, irrigation, navigation, power, silt control, and other purposes, as follows:

Project	Location	Approximate gross storage capacity (acre-feet)
Oahe	Near Pierre, S. Dak	19,600,000
Fort Randall	Near Wheeler, S. Dak	,100,000
Big Bend	Near Joe Creek, S. Dak	250,000

Senate Document 191, Seventy-eighth Congress, second session, also includes four inland reservoirs to assist in regulating the water diverted from the main stem and the irrigation of 2,292,900 acres of new lands in the Missouri River – Fort Peck to Sioux City subdivision.

9. After full discussion of the various features of the two plans in this subdivision the following main-stem reservoirs were recommended in the joint engineering report in order to more fully utilize the water resources of the basin and to most effectively serve the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power, and other uses.

Project	Location	Approximate gross storage capacity (acre-feet)
Garrison	Near Garrison, N. Dak	17,000,000
Oahe	Near Pierre, S. Dak	19,600,000
Fort Randall	Near Wheeler, S. Dak	5,100,000
Big Bend	Near Joe Creek, S. Dak	250,000
Gavins Point	Near Yankton, S. Dak	200,000

The final storage capacities to be selected for the above reservoirs will be jointly agreed upon after more detailed plans and cost estimates have been made.

10. The Garrison Dam, Reservoir, and power plant was included in the coordinated plan as it provides a large volume of useful storage capacity for flood control, navigation, and irrigation, and permits the utilization of approximately 160 feet of head for the development of hydroelectric power in an area capable of absorbing the potential output and which, otherwise, has no prospective source of abundant low-cost power. A large reservoir at the Garrison site, situated immediately below the Yellowstone River with its large silt contribution, will prolong materially the life of downstream reservoirs.

11. The selection of the high Oahe Dam, Reservoir, and power plant as proposed in Senate Document 191, Seventy-eighth Congress, second session, floods out the Oak Creek Dam, Reservoir, and power plant as proposed in House Document 475, Seventy-eighth Congress, second session. The high Oahe Dam is required in connection with the irrigation of 750,000 acres of land in the James River Basin as well as to provide useful storage for flood control, navigation, the development of hydroelectric power, and other purposes. If the Oahe Reservoir is constructed to the elevation proposed in Senate Document 191, Seventy-eighth Congress, second session, a greater storage capacity will be provided than contemplated in the low Oahe and Oak Creek Reservoirs at considerably less cost.

12. The Fort Randall Dam in House Document 475, Seventy-eighth Congress, second session, and Senate Document 191, Seventy-eighth Congress, second session, utilizes the same site. However, House Document 475 contemplates a normal pool level at 1,375 mean sea level whereas Senate Document 191 contemplates a pool level at 1,365 mean sea level, in order to not interfere with the

Big Bend power plant located near the upper limits of the reservoir. The Big Bend project is considered highly desirable in the ultimate development inasmuch as approximately 60 feet of head is thereby made available for the development of hydroelectric power. The use of the Garrison, high Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Reservoirs as outlined above and agreed upon in the joint engineering report will provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods. The plan also utilizes practically all of the available power head in the Missouri River between the mouth of the Yellowstone River and the Gavins Point Dam.

MINOR WESTERN TRIBUTARIES

13. The plan of development presented in House Document 475, Seventy-eighth Congress, second session, does not specifically designate any units in the minor western tributaries subdivision, although provisions are made for desirable and necessary projects in this area. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, provides for the construction of 15 reservoirs with a total storage capacity of 1,237,000 acre-feet, the reservoirs to be operated for flood control, silt control, the development of hydroelectric power, the irrigation of 212,980 acres of new lands, and the provision of a supplemental water supply for 11,300 acres of land now being served with an inadequate water supply. There is no conflict in the proposed plans of the two agencies for the minor western tributaries subdivision.

NIOBRARA, PLATTE, AND KANSAS RIVERS

14. The plan of development presented in House Document 475, Seventy-eighth Congress, second session, contemplates the construction of 9 reservoirs (of which 4 have been previously authorized) for flood control, irrigation, and other purposes. The lands to be irrigated were not specified in the report and were to be determined by later detailed investigation. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, contemplates the construction of 22 reservoirs on various streams in the Niobrara, Platte, and Kansas Rivers subdivision with a total storage capacity of 5,650,400 acre-feet; the reservoirs to be operated for flood control, silt control, the irrigation of 1,284,060 acres of new land, and the provision of a supplemental water supply to 21,804 acres of land now being served with an inadequate water supply. The following substitutions were found to be desirable in the Kansas River Basin:

(*a*) On the south fork of the Republican River, the Bonny Reservoir, in Senate Document 191, was substituted for the Hale Reservoir in House Document 475 to permit the irrigation of approximately 6,500 acres of additional lands. The two reservoir sites are located within 4 miles of each other and for all practicable purposes would provide a comparable degree of flood control.

(*b*) On the Arikeree River the Pioneer Reservoir, in Senate Document 191, was substituted for the Beecher Island Reservoir in House Document 475 inasmuch as the Pioneer Reservoir controlled a larger drainage area, therefore was more advantageous for flood control, and reconnaissance studies by the Bureau of Reclamation

indicated that there were no lands suitable for irrigation between the two sites.

(c) On Frenchman Creek the Enders Reservoir in House Document 475, was substituted for the Harvey Reservoir in Senate Document 191, because the Enders Reservoir could be built to a greater capacity than the Harvey Reservoir, and would furnish additional flood protection for the Frenchman Creek Valley in Nebraska. Both sites are suitably located to serve all potential irrigation developments.

LOWER MISSOURI BASIN

15. The plan of development as presented in House Document 475 and Senate Document 191 for this subdivision are identical, therefore no conflict in the engineering features of the two plans exist. The plans include seven reservoirs and a series of levees and appurtenant works along both sides of the Missouri River from the vicinity of Sioux City, Iowa, to the vicinity of the mouth of the Missouri River.

16. Development of the Missouri River Basin in accordance with House Document 475, Seventy-eighth Congress, second session, and Senate Document 191, Seventy-eighth Congress, second session, as coordinated in the enclosed joint engineering report, if authorized as a unified plan, will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation. Precise elevations and heights of reservoirs and dams, and final determinations of the power installations required, can be agreed upon after more detailed plans and cost estimates have been obtained and compared with benefits, and after

consideration has been given to the desires and objections of persons affected by the proposed developments.

HARRY W. BASHORE,
Commissioner,
Bureau of Reclamation,
Department of the Interior.

E. REYBOLD,
Major General,
Chief of Engineers, United States Army,
War Department.

WAR DEPARTMENT,
OFFICE OF THE DIVISION ENGINEER,
MISSOURI RIVER DIVISION,
Omaha, Nebr., October 17, 1944.

Subject: Joint report of representatives of Bureau of Reclamation and Corps of Engineers on plans for development of the Missouri River Basin.

To: The Chief of Engineers, United States Army, Washington, D. C., and the Commissioner, Bureau of Reclamation, Department of the Interior, Washington, D. C.

1. In accordance with instructions contained in letter of October 10, 1944, from the Commissioner of Reclamation to Mr. W. G. Sloan, assistant regional director, Bureau of Reclamation, Billings, Mont., and Mr. John Riter, acting director, Branch of Project Planning, Bureau of Reclamation, Denver, Colo., and letter of same date from the Chief of Engineers to the division engineer, Missouri River division, a conference was held in Omaha, Nebr., on October 16-17, 1944, as a result of which the following joint report is submitted.

2. For purposes of discussion, the basin was divided into the following six subdivisions contained in the report of the Bureau of Reclamation, Senate Document No. 191, Seventy-eighth Congress, second session:

(*a*) Upper Missouri River Basin.

(*b*) Yellowstone River Basin.

(*c*) Missouri River – Fort Peck to Sioux City.

(*d*) Minor western tributaries.

(*e*) Niobrara, Platte, and Kansas Rivers.

(*f*) Lower Missouri Basin.

3. It was agreed that there were no points of conflict in the engineering features of the two plans in the following subdivisions:

(*a*) Upper Missouri River Basin.

(*b*) Minor western tributaries.

(*c*) Lower Missouri Basin.

4. It was agreed that the Yellowstone River Basin be developed in accordance with the plans set forth in Senate Document No. 191, Seventh-eighth Congress, second session. With regard to the other two subdivisions all of the engineering features of both plans were agreed upon with the following modifications:

(*a*) Missouri River: Fort Peck to Sioux City.

(1) The Gavins Point Reservoir and the Garrison Reservoir to be developed in accordance with House Document No. 475 Seventy-eighth Congress, second session.

(2) The Fort Randall Reservoir, the Big Bend Reservoir, and the Oahe Reservoir to be developed in accordance with Senate Document No. 191, Seventy-eighth Congress, second session.

(3) The Oak Creek Reservoir, as proposed in House Document No. 475, Seventy-eighth Congress, second session, to be eliminated.

(*b*) Niobrara, Platte, and Kansas Rivers: It was agreed to substitute the Bonny and Pioneer Reservoirs, as proposed in Senate Document No. 191, Seventy-eighth Congress, second session, for the Hale and Beecher Island Reservoirs as proposed in House Document No. 475, Seventy-eighth Congress, second session, and to substitute the Enders Reservoir as proposed in House Document No. 475, Seventy-eighth Congress, second session, for the Harvey Reservoir as proposed in Senate Document No. 191, Seventy-eighth Congress, second session.

R. C. CRAWFORD,
Brigadier General, United States Army,
Division Engineer,

GAIL A. HATHAWAY,
Head Engineer,
Representing Office of the
Chief of Engineers.

W. G. SLOAN,
Assistant Regional Director,
Bureau of Reclamation,
Billings, Mont.

JOHN R. RITER,
Acting Director, Branch of Project Planning,
Bureau of Reclamation,
Denver, Colo.

Supreme Court, U.S.
FILED
DEC - 5 2005
OFFICE OF THE CLERK

No. 05-611

IN THE

Supreme Court of the United States

STATE OF NORTH DAKOTA and STATE OF SOUTH DAKOTA,

Petitioners,

v.

U. S. ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONSE OF ENVIRONMENTAL DEFENSE AND NATIONAL WILDLIFE FEDERATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Attorneys for Petitioners Environmental Defense and National Wildlife Federation.
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DECEMBER 5, 2005

RULE 29.6 STATEMENT

Environmental Defense Inc. and National Wildlife Federation Inc. are nonprofit corporations. They have no parent corporations and neither is publicly held.

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INTRODUCTION

Environmental Defense and the National Wildlife Federation support the petition for certiorari in this case filed by North and South Dakota and urge this Court to grant this petition and consolidate it with the petition in case number 05-631 arising out of the same decision by the Court of Appeals for the Eighth Circuit. *In re Operation of the Missouri River System Litigation*, 421 F.3d 618 (8th Cir. 2005).

REASONS TO GRANT THE WRIT

1. This case will determine if management of one of this country's legendary natural resources is frozen or can evolve to reflect contemporary economic realities.

The decision of the Court of Appeals for Eighth Circuit below held that navigation and flood control were the "dominant functions" of the Missouri River main-stem reservoirs, compared to the "secondary interests" of "recreation," "fish and wildlife," and presumably also water supply and hydropower. App. 15.[1] The Court held that these secondary interests must cede to the primary interests, and rejected arguments by North and South Dakota that management goals should change to reflect changing economics. App. 16-17.

This Court should grant review first and foremost because this decision has great significance for a multi-state conflict that has repeatedly broken out in litigation since 1989 and will probably continue for years to come.

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[1] "App. 15" refers to the page number of the appendix to North and South Dakota's Petition for Certiorari in this case.

(For earlier litigation, see, e.g., *South Dakota v. Hazen*, 914 F.2d 147 (8th Cir. 1990); *Missouri ex rel. Nixon v. Craig*, 163 F.3d 482 (8th Cir. 1998)). In general, the four upper basin states of Montana, North and South Dakota and Wyoming favor dam management that tends to conserve water in the reservoirs in their states, and the four lower basin states of Nebraska, Iowa, Kansas and Missouri tend to favor more water releases. Missouri in particular, has demanded large dam releases for barging to continue at all seasons even during severe droughts regardless of the number of barges. The equal balance as a practical matter tends to block further Congressional action. At the root of the dispute is the question of whether the Corps should manage the dams to reflect the changed economic and environmental realities since 1944, as the Upper Basin contends, or whether management must continue to focus on support for an extremely small and still declining number of barges.

The timeliness of the question presented by this Petition is particularly pressing in light of the question presented by Environmental Defense and the National Wildlife Federation in case number 05-631 arising out of the same Eighth Circuit decision. See Petition for Writ of Certiorari ("ED-NWF Petition"), Case No. 05-631 (S.Ct.). Part of the issue in that case is the Corps' failure to explain why it adopted a new Master Manual in 2004 that largely maintained the existing focus on navigation instead of selecting an alternative with more natural river flows that is better for endangered species and other river interests. ED-NWF Petition at 14-15, 24-28. The low summer flows that are a part of the more natural alternative have the effect of conserving more water in reservoirs during droughts, which benefits not only endangered species but also upper basin state recreation and hydropower. *See* Petition at 26 & n. 4; J.A. X:7859 (Table 7 13-1)

(comparing low summer flow alternative, called "GP2021" with Current Water Control Plan, "CWCP".)[2] If this Court were to agree with Petitioners in that case, the Corps would have to reevaluate its Master Manual decision. That would give great immediate significance to the Eighth Circuit's holding at issue here that in doing so the Corps must give priority to navigation and flood control.

More than 200 years after the journey by Lewis and Clark, the Missouri River remains one of this country's handful of great rivers, and an economic and environmental resource of great significance to the many states through which it flows. Navigation is the only insignificant economic use even as it commands most of the water. According to the Corps, even prior to 2004, navigation produced only half a per cent of the river's $1.8 billion in economic benefits. *See* ED Petition at 28-29 (citing J.A. X:7859.) Yet since 2004, navigation has nearly ceased following the decision of the last two commercial barge operators to abandon the river as a result of market forces. J.A. II:1342-56 (Report of Dr. Robert Stearns). The Eighth Circuit held that navigation must dominate management decisions regardless of its economic significance. Together this case and case number 05-631 will decide if the Corps can manage the Missouri River to reflect modern economic and environmental conditions.

---

[2] J.A. X:7589 refers to the Joint Appendix filed in this case before the U.S. Court of Appeals for the Eighth Circuit with "X" referring to the volume number and "7859" referring to the page number.

2. The petition presents an important question regarding the use of legislative history for statutory interpretation of civil works projects.

This Court should also grant review because the Eighth Circuit's decision below is traceable to a fundamentally incorrect method of statutory interpretation of great concern to this Court in recent years. In essence, the Court elevated Congressional expectation over statutory text, and transformed background goals allegedly gleamed from legislative history into mandates more important that actual, contrary statutory language.

The decision below extended the Eighth Circuit's previous decision in *South Dakota v. Ubbehlohde*, 330 F.3d 1014 (8th Cir. 2003). In that case, the Court held that the "dominant functions" of the Missouri River project under the Flood Control Act of 1944, Pub. L. No. 78-534 58 Stat. 887 (1944), were flood control and navigation, relegating irrigation, recreation and fish and wildlife to secondary status. 330 F.3d at 119-20. In doing so, the *Ubbehlode* court relied on the fact that when the legislative history listed the purposes of the Missouri River projects, navigation and flood control came first. *Id.* at 1032. The Court also claimed that this Court recognized this dominant legislative purpose in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988). According to *Ubbehlode*, these dominant purposes authorized the Corps to give navigation and flood control priority over recreation. *Id.*

The decision below gave these dominant purposes even greater legal effect. According to the *Ubbehlohde* decision itself, the dominant legislative purposes permitted the Corps to discriminate in favor of navigation at the expense of other purposes, but they did not require that the

Corps do so. The court noted that the portions of the legislative history describing purposes "are merely general statements of policy goals" and "not phrased as limitations on the Corps' discretion." *Id.* at 1030. By contrast, in the decision below, the court held that if the primary and secondary purposes were in conflict, the purposes of navigation and flood control must prevail, and in doing so explicitly rejected the Corps' contrary interpretation that all purposes were equal. App. 16 n. 7. The Court also held that these priorities cannot "shift according to their relative economic value." App. 17.

There are two fundamental flaws with the combined reasoning of *Ubbehlohde* and the decision below. First, the language in *ETSI* used by the Eighth Circuit was not even dicta in support of the Eighth Circuit's conclusion because this Court was not addressing the criteria the Corps should use in managing the Missouri's main-stem dams, only the division of agency responsibilities between the Corps and the Interior Department. The issue in *ETSI* was whether the Corps or the Bureau of Reclamation controlled the distribution of water stored in the river's reservoirs. This Court held that plain language in the Flood Control Act of 1944 directly controlled the question because it gave the Corps control over water stored behind all of the reservoirs it managed. 484 U.S. at 505-06.

The language in *ETSI* cited by the Eighth Circuit did not address the criteria the Corps should use in making management decisions. The language instead formed part of a discussion by this Court of whether, notwithstanding the plain language of the statute, the importance the legislative history placed on irrigation implied unilateral authority for the Interior Department over withdrawal of reservoir water for irrigation purposes. In this section of its opinion, this Court discussed how the statutory

provision assigning the Corps control over the reservoirs and dams arose from the Corps' historic control of navigation and flood control, and in that context, noted the "dominant functions" recognized by the Sloan Plan of the main-stem reservoirs. Yet, this Court also recognized that in making the case why it should maintain control over the Missouri River dams, the Corps expressed its willingness "to coordinate its activities with Interior in order to serve 'the broad and important responsibilities' of both agencies." *Id.* at 511. "But this accession is not at all the same as dividing control between the two agencies over the reservoirs projects or the water stored in these projects" and thus could not be read as overriding the plain language of the statute dividing agency responsibilities. *Id.* at 511-12. In other words, in the very language cited by the Eighth Circuit, this Court itself distinguished between the issue of agency jurisdiction and the standards that would guide the agency's exercise of its jurisdiction.

Second, and even more importantly, the Eighth Circuit has confused the entirely separate questions of what Congress expects when it authorizes a project with the legal management duties it assigns. There is no doubt that Congress expected the Missouri River project to produce great navigation benefits. But that does not mean Congress required the Corps to manage the river with a priority for navigation over other interests, let alone that it instructed the Corps to do so even if economic conditions changed decades later.

The Eighth Circuit made the fundamental error of treating legislative history as if it were statutory text, an error this Court has repeatedly tried to correct. "The starting point in discerning congressional intent is the existing statutory text," and "'when the statute's language is plain, the sole function of the courts—at least where the

disposition is not absurd—is to enforce it according to its terms.'" *Lamie v. United States*, 540 U.S. 526, 534 (2004) (citations and quotation marks omitted). The preeminent canon of statutory interpretation requires that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) (citations omitted).[3] The Flood Control Act of 1944 was a broad water projects bill that authorized the Missouri River Pick-Sloan plan along with many other water projects, 58 Stat. 891-896, but also set forth several generic policy provisions governing the responsibilities of the Corps, the Department of Interior and the Department of Agriculture for flood control throughout the country. The language specifically governing the Missouri River was set forth only in Section 9. It "approved" the "general comprehensive plans . . . as revised and coordinated by Senate Document 247," the Pick-Sloan plan, and it authorized the War Department and Department of the

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[3] This Court has emphasized this point repeatedly. *See, e.g., BedRoc Ltd. v. U.S.* 541 U.S. 176, 183 (2004) (plurality) ("The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.") (citations and quotation marks deleted); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("[W]hen 'the statute's language is plain, 'the sole function of the courts' – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.") (citations and quotation marks deleted); *United States v. Ron Pair enterprises, Inc.*, 489 U.S. 235, 241 (1989) (task "must begin with the language of the statute itself" and end there if "the statute's language is plain") (punctuation and citations deleted).

Interior to "prosecute" the plan "as speedily as may be consistent with budgetary requirements." § 9(a), 58 Stat. 891, App. 97. Nothing in this language assigned the Corps priorities for subsequent dam management.

The Eighth Circuit's method of interpretation is particularly troubling because it did not use legislative history to interpret statutory text. Instead, the court construed a statutory mandate out of a kind of floating legislative purpose that did not give meaning to any actual statutory language cited by the court. Members of this Court have disagreed at times about the value of legislative history, but all have agreed that its value is limited at most to help in interpreting statutory terms. *See Exxon Mobil Corp. v Allapattah Servs.*, 125 S Ct 2611, 2626 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."). *Compare Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390-91 (2000) (Scalia, J., concurring) ("The *only* reliable indication of [legislative] intent -- the only thing we know for sure can be attributed to *all* of them -- is the words of the bill that they voted to make law.") (citations and footnotes omitted) *with* Stephen Breyer, "On the Uses of Legislative History in Interpreting Statutes," 65 S. Cal. L. Rev. 845, 863 (1992) (defending use of legislative history "in trying to understand the meaning of the words that do make up the statute").

The Eighth Circuit even went so far as to elevate the purpose it gleaned from legislative history over contrary purposes set forth in actual statutory text. The 1944 Act included introductory language that expressed the intent "to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated

consistently with appropriate and economic use of the waters of such rivers by other users." 58 Stat at 888, App. 90 (emphasis supplied). The statutory text itself therefore expressed Congress's intent to support navigation only to the extent it was consistent with other appropriate economic uses. That directly contradicts the Eighth Circuit's ruling below that Congress did not permit "priority of interests under the FCA to shift according to their relative economic value." App. 17.[4]

Indeed, even if the Eighth Circuit had found the statute ambiguous, the remedy was not to journey through the legislative history but to defer to the Corps' construction. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In the final EIS for the 2004 Master Manual, the Corps found that Congress had not defined any "standard of any kind for management of the recommended purposes" other than its identification of the system's broad purposes, "among them being flood

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[4] The Eighth Circuit's use of legislative history in this case exemplifies how excessive reliance on legislative history can be, in the famous phrase of Judge Leventhal, "an exercise in 'looking over a crowd and picking out your friends.'" *Exxon Mobil Corp.*, 125 S. Ct. at 2626 (citation omitted). While the Eighth Circuit inferred a dominant purpose from the limited evidence of their unanimous order of listing in legislative reports -- a factual assertion that was itself incorrect as shown below-- it declined to find significance in a large number of quotations in those same reports stating that the Corps should balance the purposes to maximize benefits. *See Ubbelohde*, 330 F.3d at 1030 (refusing to credit statements in project reports that the plan "will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation" and "will be operated for maximum multiple purpose use.").

control, irrigation, navigation, power, fish and wildlife, and recreation." J.A. X:7986. See discussion below at App. 16 n. 7. Principles of deference therefore also call for an equal balancing of the different project goals.

To the Court below, Congressional expectations were the equivalent of statutory mandates regardless of statutory language. Such a view, if applied more broadly, would freeze the management of public infrastructure by requiring agencies to manage them according to original expectations even when economic conditions change dramatically. This case is important because the Eighth Circuit's failure to follow this court's rules of statutory interpretation has serious implications for the rational management of aging public investments.

CONCLUSION

Between them, this petition and the petition in case number 05-631 will determine if management of the Missouri River can evolve to reflect changed economic and environmental needs. For the foregoing reasons, this Court should grant both petitions for certiorari and consolidate them for argument.

Respectfully submitted,

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December 5, 2005

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Supreme Court, U.S.
FILED
FEB 16 2006
OFFICE OF THE CLERK

No. 05-611

In The Supreme Court of the United States

STATE OF NORTH DAKOTA and
STATE OF SOUTH DAKOTA,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT BRIEF OF THE STATE OF NEBRASKA AND THE NEBRASKA PUBLIC POWER DISTRICT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15, the State of Nebraska and the Nebraska Public Power District (collectively, the "Joint Respondents") submit this Joint Brief in Opposition to the Petition for Writ of Certiorari ("Petition") filed by the State of North Dakota and the State of South Dakota (together, the "Dakotas").

The Dakotas once again ask this Court to second guess the wisdom of congressional policy established in the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944). The Court earlier declined to do so when it denied the Dakotas' petition for writ of certiorari from the Eighth Circuit Court of Appeals' decision in *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), cert. denied *North Dakota v. Ubbelohde*, 514 U.S. 987, 124 S.Ct. 2015 (2004). Consistent with *Ubbelohde*, and this Court's decision in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 108 S.Ct. 805 (1988), the Court of Appeals held that the Flood Control Act embodies congressional design to prioritize flood control and navigation over other, secondary functions served by the Missouri River mainstem reservoirs. There is no basis for the Dakotas' second request to revisit this issue. The Petition should be denied.

OBJECTION TO CONSIDERATION OF THE QUESTION PRESENTED

Pursuant to Supreme Court Rule 15.2, the Joint Respondents object to the Dakotas' portrayal of this matter as a dispute between upstream recreation interests and a "marginally economic, downstream navigation industry." Petition at 2. Respondents also object to the

Dakotas' attempt to revisit an issue already decided as explained below. The Question Presented is whether flood control and navigation are the dominant functions of the reservoirs on the mainstem of the Missouri River. As the Petition recognizes, this issue was decided in *ETSI* and *Ubbelohde*.[1]

STATEMENT OF THE CASE

I. THIS CASE IS NOT ABOUT EQUITABLY APPORTIONING THE WATERS OF THE MISSOURI RIVER.

As a preliminary matter it is important to recognize what this case is not. The Petition offers: "Certiorari is warranted because this case, at its heart, is an inter-state dispute over properly allocating water in a major river" that is "akin to the equitable apportionment cases the Court often hears under its original jurisdiction." Petition at 24. This Court has explained:

> Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream. *Kansas v. Colorado*, 206 U.S. 46, 98, 27 S.Ct. 655, 667-668, 51 L.Ed. 956 (1907); *Connecticut v. Massachusetts*, 282 U.S.

[1] *Compare* Petition at 11 ("Also that summer [2003], the Eighth Circuit issued a decision on the Corps' appeal of the 2002 injunctions. *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003). Relying primarily on *ETSI Pipeline*, the court ruled that while the 1944 Flood Control Act requires the Corps to balance all uses, it gives navigation a priority. *Id.* at 1019-20.) *with* Petition at 12 ("On appeal [in the instant matter], however, the Eighth Circuit gave downstream navigation a priority, describing it as a 'dominant function.' *Ubbelohde*, 330 F.3d at 1019-20.").

660, 670-671, 51 S.Ct. 286, 289-290, 75 L.Ed. 602 (1931). It is a flexible doctrine which calls for "the exercise of an informed judgment on a consideration of many factors" to secure a "just and equitable" allocation. *Nebraska v. Wyoming*, 325 U.S. 589, 618, 65 S.Ct. 1332, 1350-1351, 89 L.Ed. 1815 (1945). We have stressed that in arriving at "the delicate adjustment of interests which must be made," *ibid.*, we must consider all relevant factors, including:

> "physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former." *Nebraska v. Wyoming*, 325 U.S. 589, 618, 65 S.Ct. 1332, 1351, 89 L.Ed. 1815 (1945).

Colorado v. New Mexico, 459 U.S. 176, 183, 103 S.Ct. 539, 545 (1982).

This case does not involve claims among or between the States in the Missouri River Basin. Nor does it involve "federal common law." The only "relevant factor" involved in this matter is congressional intent embodied in the Flood Control Act and the underlying "Pick" and "Sloan" Plans, as reconciled by Congress in 1944.[2] This case is

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[2] The Flood Control Act approved a compromise of comprehensive plans for projects proposed by the Secretary of War on one hand (the "Pick Plan," *see* H.R. DOC. NO. 475, 78th Cong., 2d Sess. (1944)), and by the Secretary of the Interior on the other (the "Sloan Plan," *see* S. DOC.

(Continued on following page)

about the United States Army Corps of Engineers' ("Corps") obligations under the Flood Control Act and the manner in which Congress directed the Corps to operate the dams under its control on the Missouri River. As explained next, when the Corps attempted to depart from that direction, the Eighth Circuit was forced to correct the Corps' course. It is the Eighth Circuit's interpretation of a Federal agency's obligations under a Federal statute with which the Dakotas quibble. This case does not resemble remotely those in which this Court exercises its original jurisdiction to resolve interstate disputes.

II. MISSOURI RIVER MAINSTEM DAM AND RESERVOIR MANAGEMENT.

In 1944, Congress explained: "The water of the Missouri River system is a primary national resource which, up to the present time, has been inadequately controlled and developed." S. DOC. NO. 191 at 10. To that end, Congress enacted the Flood Control Act, authorizing the construction and operation of dams and reservoirs on the mainstem of the Missouri River by the Corps.[3] This Court previously determined that flood control and navigation are the "dominant function" of those reservoirs. *ETSI*, 484 U.S. at 512, 108 S.Ct. at 815. In addition, the mainstem dam and reservoir system provides a wide range of benefits to each of the Missouri River Basin states. Additional authorized project purposes include water supply, power

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NO. 191, 78th Cong., 2d Sess. (1944)). The compromise report is S. DOC. NO. 247, 78th Cong., 2d Sess. (1944).

[3] The Dakotas incorrectly state that all five reservoirs are located within their borders. Petition at 4. One of the dams, Gavins Point, is located in both South Dakota and Nebraska.

generation, irrigation, recreation and fish and wildlife. *E.g.*, S. DOC. NO. 247 at 3.

Contrary to the Dakotas' characterization, this matter does not simply pit the downstream navigation industry against upstream recreation interests in the Dakotas. *E.g.*, Petition at 2. By way of illustration, the National Academy of Sciences highlighted the importance of the Missouri River as a source of water supply for municipal and industrial uses. NATIONAL ACADEMY PRESS, THE MISSOURI RIVER ECOSYSTEM: EXPLORING THE PROSPECTS FOR RECOVERY (2002).[4] The water supply benefits of the Missouri River "accrue at intakes for thermal power plants and at municipal, irrigation, commercial/industrial, domestic, and public water intakes so long as daily flows exceed minimum elevation requirements for water intakes." *Id.* at 93. In 1994, for instance, the Corps found $571.6 million in annual benefits (i.e., cost savings) from the withdrawal of water from the Missouri River. *Id.* Hydropower benefits, measured by the costs of alternative supplies, have an annualized value of $615 million. *Id.* at 97. The Basin has received an estimated $18 billion in total flood damage prevented as of 1998. *Id.* at 99. While flood control and navigation are the "dominant" function of the mainstem reservoirs, the Corps' service of those purposes supports the extensive infrastructure that developed around the flow regime maintained by the Corps under the traditional interpretation of the Flood Control Act's priorities.

To implement the provisions of the Flood Control Act, the Corps adopted regulations in accordance with Section

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[4] The National Academy of Sciences' Report is reproduced in the Joint Appendix filed with the Court of Appeals at pp. 5027-5120.

7 of that Act, now codified at 33 U.S.C. § 709, requiring the establishment of "water control plans" for all Corps projects, and the preparation of "master manuals" where several projects within a drainage have interrelated purposes. 33 C.F.R. § 222.5(a) & (i)(2). The Corps adopted the Missouri River Mainstem Reservoir System Reservoir Regulation Manual ("Master Manual") in 1960. The Corps revised the Master Manual in 1975, 1979 and most recently in 2004. Master manuals are intended to set forth the regulatory framework by which the Corps will achieve the multiple purposes for which the dams and reservoirs were created.

III. EVOLUTION OF THE QUESTION PRESENTED.

The Dakotas seek review of a footnote in the Court of Appeals' opinion explaining the relative priority of the mainstem reservoirs. *See In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 629, n.7 (8th Cir. 2005). Therein the court explained, in material part:

> The Corps states in § 7-01 of the 2004 Master Manual that in the FCA, "Congress did not assign a priority to these purposes" of "flood control, navigation, irrigation, hydropower, . . . recreation, and fish and wildlife. . . . " To the contrary, as we clearly stated in *Ubbelohde*, the FCA has been interpreted to hold flood control and navigation dominant and recreation, fish and wildlife secondary. *Ubbelohde*, 330 F.3d at 1019-20.

421 F.3d at 629, n.7.

The Court of Appeals reiterated this point of law because when revising the 2004 Master Manual,[6] the Corps – in a striking departure from prior versions of the Master Manual – proclaimed for the first time in an official rulemaking that the Flood Control Act authorized the Corps to serve the functions of the mainstem reservoirs on a relative priority the Corps saw fit to establish. Ignoring the Eighth Circuit's holding in *Ubbelohde*, the Corps contended that the Flood Control Act afforded no priority to flood control or navigation. The Dakotas supported the Corps' interpretation and this provision in the 2004 Master Manual.

The Joint Respondents challenged the Corps' interpretation of the Flood Control Act as set forth in the 2004 Master Manual. The district court ruled in favor of the Corps, and the Joint Respondents appealed the issue to the Eighth Circuit. The Joint Respondents contended that Congress established flood control and navigation as the dominant functions of the mainstem Missouri River reservoirs and that *Ubbelohde* foreclosed further debate on the matter. The Court of Appeals ruled in favor of the Joint Respondents on this point.

In disposing of the Dakotas' contention that the Corps was entitled to adjust priorities under the Flood Control Act, the Court of Appeals explained that "[n]othing in the text or legislative history of the FCA suggests that Congress

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[6] The official title of this document is the MISSOURI RIVER MAINSTEM RESERVOIR SYSTEM, MASTER WATER CONTROL MANUAL (2004). The Master Manual was promulgated pursuant to Section 7 of the Flood Control Act and 33 C.F.R. § 222.5. The Master Manual is a binding rule that governs the Corps' operation of the reservoirs on the mainstem of the Missouri River. *Ubbelohde*, 330 F.3d at 1029.

intended the priority of interests under the FCA to shift according to their relative economic value." *In re Operation of the Missouri River System Litigation*, 421 F.3d at 629-30. The court correctly explained that the Dakotas' "[a]rguments based on the wisdom of the priorities established by the FCA must be addressed to Congress." *Id.* at 630. *See also Ubbelohde*, 330 F.3d at 1030-32 (rejecting Dakotas' claims that Corps must maximize benefits to all interests on the Missouri River).

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 states "[a] petition for writ of certiorari will be granted only for compelling reasons." The rule illuminates the "character of the reasons" a petition might be granted, including the existence of a conflict between the circuit courts, of a conflict created by a state supreme court decision, or a decision determining an important Federal question for the first time or in a manner contrary to this Court's prior decisions. *Id.* The Dakotas' Petition has none of these characteristics. The Dakotas are attempting to use their Petition to obtain review of Congressional choices reflected in the Flood Control Act. A petition for certiorari is not the appropriate vehicle for the Dakotas' cause.

I. THE PETITION FAILS TO PRESENT COMPELLING REASONS TO GRANT CERTIORARI.

The Petition does not argue that there is a conflict among the Circuit Courts of Appeal with regard to the Question Presented. Nor does the Petition contend that the Eighth Circuit's decision represents the initial resolution of

an important Federal question. The Petition does not argue that the Question Presented was resolved in a manner contrary to this Court's prior decisions. In sum, the Petition entirely ignores Rule 10.

Rather, the Petition asserts two reasons that this Court should grant certiorari review: 1) the Court of Appeals "rewrote" the Flood Control Act; and 2) the Court of Appeals "ignored" the Corps' administrative interpretation of its obligations under the Flood Control Act. The first argument is incorrect as a matter of law. The second argument is incorrect as a matter of fact. Regardless, however, neither supports a grant of certiorari under Rule 10.

II. THE EIGHTH CIRCUIT ADHERED STRICTLY TO ITS PRIOR DECISION IN *UBBELOHDE* AND THIS COURT'S RULING IN *ETSI*.

In describing the priority of the mainstem reservoirs, the Eighth Circuit relied squarely on its prior decision in *Ubbelohde*. *In re Operation of the Missouri River System Litigation*, 421 F.3d at 629, n.7. There, the Court of Appeals explained:

> The [Flood Control] Act also laid out certain substantive interests that it was to serve. The dominant functions of the Flood Control Act were to avoid flooding and to maintain downstream navigation. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). The Act's dominant functions were expressed repeatedly in three Congressional Documents: Senate Documents 191 and 247 and House Document 475. See Flood Control Act Section 9, 58 Stat. at 891. House Document 475,

> which represented one of two competing plans, confirmed this view, stressing flood control. H.R. Doc. No. 475, 78th Cong., 2d Sess. 28-29 (1944). At the same time, however, the Act recognizes secondary uses of the River including irrigation, recreation, fish, and wildlife. *See* Flood Control Act Section 4, 58 Stat. at 889-90; 33 U.S.C. § 708; 43 U.S.C. § 390.

Ubbelohde, 330 F.3d at 1019-20. *See also id.* at 1028 ("The Act recognizes what the Supreme Court has called the dominant functions of the River's reservoir system – flood control and navigation. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). While flood control and navigation are dominant functions, the Act also recognizes recreation and other interests and secondary uses that should be provided for."); *id.* at 1032 (" . . . the Corps's primary concerns should be flood control and navigation. The Supreme Court appears to have accepted as much. *ETSI*, 484 U.S. at 512, 108 S.Ct. 805."). There is nothing surprising about the Eighth Circuit's adherence to *Ubbelohde* in the case below. In fact, as Nebraska pointed out in its briefs below, *Ubbelohde* represented the law of this case.[6] *See* Appellant's [Nebraska's] Opening Brief at 21.

As evidenced by the selected passages above, *Ubbelohde* relied on this Court's decision in *ETSI*. In *ETSI* this Court carefully reviewed the Flood Control Act, along with the Pick and Sloan Plans, and the committee report reconciling the two, to conclude that all reservoirs under

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[6] To be clear, the instant Petition arises in the context of the same legal proceeding in which this Court denied certiorari in *North Dakota v. Ubbelohde*, 514 U.S. 987, 124 S.Ct. 2015 (2004).

the control of the Secretary of the Army had as their "dominant" purpose flood control and navigation. *ETSI*, 484 U.S. at 512, 108 S.Ct. at 815. Paradoxically, the Dakotas do not dispute that flood control is a dominant function of the mainstem reservoirs. Petition at 4, n.2. There is no basis on which to distinguish flood control from navigation in *ETSI's* treatment of the dominant purposes. This Court there explained: "The Sloan Plan recognized that the 'dominant function' of Lake Oahe and the other main-stem reservoir projects would be *flood control and navigation*, ..." *ETSI*, 484 U.S. at 512, 108 S.Ct. at 815 (emphasis supplied). The Petition, nevertheless, erroneously asserts that the portions of *ETSI* discussing the dominance of navigation on which the Eighth Circuit relied in *Ubbelohde* and again in the decision below are somehow "dicta." Petition at 17-20.

At issue in *ETSI* was the Secretary of the Interior's ability to contract for water in Lake Oahe, a Corps-operated reservoir. The petitioners, ETSI Pipeline Project, argued that the Secretary of the Interior possessed authority to contract for water stored in Lake Oahe without obtaining the Secretary of the Army's approval. In support, ETSI Pipeline Project argued that Sections 9(a) and (c) of the Flood Control Act (approving the Pick and Sloan Plans) indicated congressional intent to divide control of the mainstem reservoirs on the Missouri River in a manner that allowed the Secretary of the Interior to unilaterally allocate the water in Lake Oahe. 484 U.S. at 509, 108 S.Ct. at 813.

After reviewing in great detail the Pick and Sloan Plans, this Court found "nothing in those two plans indicates control over individual reservoirs was to be divided among various departments of the Federal Government." 484 U.S.

at 511, 108 S.Ct. at 814. Disposing of the petitioners' argument, the Court found that the Sloan Plan "recognized that the 'dominant function' of Lake Oahe and the other main-stem reservoir projects would be flood control and navigation, ..." 484 U.S. at 512, 108 S.Ct. at 815.[7] This determination was relevant because under the Pick and Sloan Plans, the agency "with primary interest in the dominant function of any feature proposed in the plan" maintained control over that feature. *Id.* Based on that analysis, this Court held that the Secretary of the Interior could not unilaterally contract for water stored in that reservoir because the Secretary of the Army controlled Lake Oahe under the jurisdictional design of the Flood Control Act. Thus, contrary to the Dakotas' suggestion, this Court's finding that flood control and navigation were the dominant functions of Lake Oahe was critical to its holding in *ETSI*.

This Court's determination in *ETSI* and the Eighth Circuit's holding in *Ubbelohde* reflect the will of Congress to subjugate recreation and fish and wildlife to flood control and navigation. Section 4 of the Flood Control Act, for example, states: "The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes . . . *when such use is determined by the*

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[7] The Dakotas criticize the Eighth Circuit for relying on this passage because it does not, in the Dakotas' view, take into account the language of the Pick Plan. Petition at 18. This is a red herring. The Supreme Court explained clearly that the Sloan Plan "basically agreed with the Pick Plan, recognizing that the agency 'with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature,' . . . ." 484 U.S. at 512, 108 S.Ct. at 815.

Secretary of War not to be contrary to the public interest." (Emphasis supplied). There is no such "public interest" limitation on any other authorized use.

When speaking to the role of the mainstem reservoirs at issue here, the Pick-Sloan architects made their purpose clear: "All these reservoirs will serve *one fundamental purpose*, namely, that of impounding water in periods of heavy run-off from the land, and releasing it during periods of low stream flow." S. Doc. No. 191 at 21. (Emphasis supplied). Moreover:

> The use of the Garrison, high Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Reservoirs as outlined above and agreed upon in the joint engineering report will provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods.

S. Doc. No. 247 at 3-4. The Sloan Plan similarly states, with regard to the reservoirs at issue:

> This basin-wide plan provides for a number of reservoirs on the upper reaches of the Missouri River and its tributaries, for the purposes of storing water, and releasing it during periods of low flow.

S. Doc. No. 191 at 17-18. The Plan explains that the water stored in Oahe Reservoir "will be available for navigation purposes on the lower river" and that ample storage capacity will be provided to reduce downstream flood flows from Sioux City to Kansas City. *Id.* at 116. Further, "[a]s the flow of the river at Oahe is to be regulated to permit downstream navigation, large outflows will be required during the navigation season, from March 15 to November

15 of each year." *Id.* Interpreting Pick, the Sloan Plan notes that on the mainstem of the Missouri River, the Corps intends to create storage "at the Garrison, Oak Creek, Oahe, Fort Randall, and Gavins Point sites for flood control, navigation, power production, and irrigation purposes." *Id.* at 121.

While the Pick and Sloan Plans recognized that construction and operation of mainstem dams and reservoirs would incidentally create recreation and wildlife opportunities, neither Plan contemplated operation of reservoirs or other facilities for the express purpose of promoting such interests to the exclusion of flood control or navigation. The notion that any of the Corps-operated reservoirs should be operated to retain water upstream in satisfaction of incidental recreational interests to the exclusion of enumerated downstream uses is simply inconsistent with the plan approved by Congress in 1944.

III. THE AGENCY INTERPRETATION TO WHICH THE DAKOTAS ASK THE COURT TO DEFER WAS ARBITRARY AND CAPRICIOUS.

The Petition suggests, alternatively, that the Eighth Circuit erred by refusing to defer to the Corps' interpretation that Congress established no priority in the Flood Control Act. The Dakotas fail to explain, however, that that interpretation represented a dramatic departure from *ETSI*, *Ubbelohde* and the Corps' earlier interpretation, which had governed Corps operations for over four decades. As the Joint Respondents argued to the Court of Appeals, the Corps' shift was arbitrary and capricious. *See, e.g.*, Appellant's [Nebraska's] Opening Brief at 12-16. The Court of Appeals recognized as much and properly refused to defer to the Corps' unreasonable interpretation.

Under this Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782 (1984), *see* Petition at 23, a court will defer to an agency's reasonable interpretation of an ambiguous statute. Review under *Chevron* is a two step process. The first step is to determine whether Congress has spoken to the question at issue: If the intent of Congress is clear, the matter is ended. A court, as well as an agency, must give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781. Where an agency's statutory interpretation is contrary to a court's previous interpretation, the court:

> need not decide what, if any deference is owed the [agency] in order to reject its alleged contrary interpretation. Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of the *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.

Neal v. U.S., 516 U.S. 284, 285, 116 S.Ct. 763, 764 (1996). Stated differently, after a court construes the meaning of a statute on a particular matter, any attempt by an agency to interpret the statute to the contrary is reviewed under step one of *Chevron*. The court's interpretation becomes "the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781. "Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position. . . ." *U.S. v. Mead Corp.*, 533 U.S. 218, 247, 121 S.Ct. 2164, 2182 (2001) (Scalia dissenting) (emphasis original). *See also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37, 112 S.Ct. 841, 848 (1992) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we

judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.").

To the extent there was any ambiguity with regard to the Corps' relative obligations under the Flood Control Act, the Court laid it to rest in *Ubbelohde*. It was only when the Corps attempted to circumvent *Ubbelohde* that the Joint Respondents challenged the Corps' about-face under the Administrative Procedure Act, 5 U.S.C. § 706(2).[8] By that time, this Court had denied certiorari review of *Ubbelohde*, and the law regarding the priority of the mainstem dams was settled. The Corps' repudiation of the Court of Appeals' *Ubbelohde* decision was simply arbitrary and capricious.

In light of *ETSI* and *Ubbelohde*, the Court of Appeals did not need to proceed beyond step one in the *Chevron* analysis to dispose of the Dakotas' claim. Setting aside for sake of argument the weight of *ETSI* and *Ubbelohde*, the Corps' interpretation fell short under step two of the *Chevron* analysis. Under step two, a reviewing court will defer to an agency's interpretation if it reflects a permissible construction of an ambiguous statute. An interpretation that is inconsistent with the agency's earlier interpretation, however, "is entitled to considerably less deference" than would otherwise be afforded under *Chevron*. *Watt v. Alaska*, 451 U.S. 259, 273, 101 S.Ct. 1673, 1681 (1981). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 447, n.30, 107 S.Ct. 1207, 1221 (1987) (same); *Thomas Jefferson Univ. v. Shalala*,

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[8] Contrary to the Dakotas' contention, the Court of Appeals did not ignore the Corps' interpretation, but rather rejected it at the urging of the Joint Respondents.

512 U.S. 504, 515, 114 S.Ct. 2381, 2388 (1994) (same); *Pauley v. [illegible] Energy Mines, Inc.*, 501 U.S. 680, 698, 111 S.Ct. 2524, 2535 (1991) ("the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.").

When an agency changes its interpretation, it is "obligated to supply a reasoned analysis for the change. . . ." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S.Ct. 2856, 2866 (1983). "Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation" are "pitfalls" to an agency receiving *Chevron* deference under step two. *Smiley v. Citibank*, 517 U.S. 735, 742, 116 S.Ct. 1730, 1734 (1996) (internal citations omitted). Moreover, "[a] settled course of behavior embodies the agency's informed judgment that, by pursing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those polices will be carried out best if the settled rule is adhered to." *Motor Vehicle Mfrs.*, 463 U.S. at 41-42, 103 S.Ct. at 2866.

The Corps recognized in earlier versions of the Master Manual that fishing and other recreational pursuits at the mainstem reservoirs were authorized only to the extent such pursuits did not interfere with other project purposes. For example, in the 1979 version of the Master Manual,[9] Section IX, ¶ 9-3 stated "*insofar as possible without serious interference* with the foregoing functions [flood control, irrigation, municipal and industrial and

[9] The title of this document is the MISSOURI RIVER MAINSTEM RESERVOIR SYSTEM RESERVOIR REGULATION MANUAL (1979). It is reproduced in the Joint Appendix filed with the Court of Appeals at pp. 01826-02069.

water quality, navigation and power], the reservoirs will be operated for maximum benefit to recreation, fish and wildlife." (Emphasis supplied). Section IX, ¶ 9-35 similarly provided "[w]hile manipulation of the levels of larger reservoirs (Fort Peck, Garrison, and Oahe) to enhance this function [outdoor recreational pursuits] is not practical, recreation will be recognized during periods of system storage drawdown by maintenance of balanced storage within these two [sic] projects *to the extent practical.*" (Emphasis supplied). *See also* Section IX, ¶¶ 9-31 and 9-38 (recognizing the unavoidable necessity of fluctuating reservoir levels to support functions for which the reservoirs were designed).[10]

These provisions of the 1979 Master Manual were consistent with the Corps' long-held interpretation that recreation and fish and wildlife interests were secondary uses subordinate to the Corps' duty to maintain the dominance of flood control and navigation. *See, e.g., The Role of Recreation in the Regulation of the Corps of Engineers Constructed and Operated Mainstem Reservoirs of the Missouri River*, 4 Great Plains Nat. Resources J. 26 (Fall 1999). The Corps' Office of General Counsel there explained that the mainstem reservoirs were "designed primarily to accommodate flood control, irrigation, navigation and power, with additional purposes such as recreation to be served to the maximum extent possible without

[10] Notably, as evidence of the Corps' interpretation that the Flood Control Act contains no priority, the Dakotas offer informal letters from Corps counsel and *post-hoc* rationalizations of counsel offered during this litigation. Informal statements are not authoritative under *Chevron* or related cases. *See generally U.S. v. Mead Corp., supra*. Moreover, courts cannot accept appellate counsels' *post-hoc* rationalizations for agency actions. *Motor Vehicle Mfrs.*, 463 U.S. at 50, 103 S.Ct. at 2856.

serious interference with the foregoing purposes." *Id.* at 48. The General Counsel opined, "any [Master Manual] revision involving a long term or permanent change in the operation of the system that would serve as a significant detriment to one or more of the actual purposes or the currently settled priorities of the system would suggest the need for prior congressional authorization." *Id.*

In attempting to adjust the relative priority of the mainstem reservoirs, the Corps provided no analysis supporting its new interpretation that all project purposes occupied a co-equal status. The Corps also failed to consider the impacts of downstream interests' legitimate reliance on its past treatment of navigation as a "dominant function." The Corps' reversal of its settled course of conduct was not entitled to *Chevron* deference, *see Smiley*, 517 U.S. at 742, 116 S.Ct. at 1734, and the Court of Appeals did not err when it refused to accord such deference to the Corps' impermissible interpretation of the Flood Control Act.

IV. THE DAKOTAS ASK THE COURT TO REVIEW AND JUDGE THE WISDOM OF CONGRESS' CHOICES IN THE FLOOD CONTROL ACT.

By this action, the Dakotas again seek judicial review of the wisdom of congressional choice reflected in the Flood Control Act. They contend that their Petition "is about allocating the Missouri River among seven states." Petition at 13. This, of course, reveals the true nature of what the Dakotas seek here – equitable relief designed to effectively allocate the waters of the Missouri River.

The Dakotas ask this Court to rewrite the historical development of the Upper Basin. They ask the Court make up for lost opportunities and benefits once foreseen but

never derived. Petition at 4-8, 24. The litigants, of course, may debate the Dakotas' account of the Basin's development. This is especially true in light of the fact that the very industries the Dakotas seek to enhance in this case were created in the first instance by construction of the mainstem reservoirs.

The Petition is about maximizing the Dakotas' interests at the expense of established downstream uses authorized by Congress and reliant on the "dominance" of flood control and navigation. It is about making up for opportunities lost. To the extent the Dakotas believe their interests are not adequately represented, the Dakotas may seek relief from Congress or attempt to invoke properly the original jurisdiction of this Court.

CONCLUSION

The Dakotas challenge the Court of Appeals' statement that the Flood Control Act prioritizes flood control and navigation above all other uses on the mainstem Missouri River reservoirs. Petition at 2. The Petition, however, expressly acknowledges that the Court of Appeals decided this issue in *Ubbelohde* over two years ago. Petition at 11 (" . . . the [*Ubbelohde*] court ruled that while the 1944 Flood Control Act requires the Corps to balance all uses, it gives navigation a priority."). This Court denied certiorari in *Ubbelohde*. The priority debate has been foreclosed, and the Dakotas are not entitled to revisit this issue. Perhaps recognizing the severity of their posture, the Dakotas' Petition again asks this Court to review the

wisdom of congressional choices made decades ago. Such a request is misplaced. The Petition should be denied.

Respectfully submitted,

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No. 05-611

FILED
FEB 16 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

STATE OF NORTH DAKOTA AND
STATE OF SOUTH DAKOTA, PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Flood Control Act of 1944, ch. 665, 58 Stat. 887, requires the Army Corps of Engineers to give priority to navigation over other functions in managing the waters of the Missouri River Basin.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 421 F.3d 618. The memorandum and order of the district court (Pet. App. 35-89) is reported at 363 F. Supp. 2d 1145.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2005. The petition for a writ of certiorari was filed on November 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a series of lawsuits filed by various States and other entities concerning the operation of

dams and reservoirs along the Missouri River by the United States Army Corps of Engineers (the Corps). The Judicial Panel on Multidistrict Litigation consolidated those lawsuits for pretrial proceedings. In the consolidated action, Nebraska, Missouri, and other downstream parties alleged that a new plan adopted by the Corps in 2004 to govern its management of the Missouri River dam system violated various statutes. In addition, environmental groups alleged that the actions of the Corps and the Fish and Wildlife Service in the Department of the Interior violated the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, and the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* The district court granted summary judgment to the federal defendants on all of those claims. Pet. App. 35-89. The court of appeals affirmed in relevant part. *Id.* at 1-34. Petitioners participated as appellees in the court of appeals, and supported the Corps against the claims of the downstream parties.[1]

1. Congress enacted the Flood Control Act of 1944 (Flood Control Act or the Act), ch. 665, 58 Stat. 887, to provide for the comprehensive management of the waters of the Missouri River Basin. Along with other legis-

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[1] The environmental groups have filed their own petition for a writ of certiorari, challenging the court of appeals' disposition of their ESA and NEPA claims. See *Environmental Defense* v. *United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-631 (filed Nov. 14, 2005). In addition, petitioner North Dakota, together with various state agencies and officials, has filed a petition for a writ of certiorari, seeking review of a separate decision in which the court of appeals rejected its claim that the Corps' operations violated state-law water-quality standards. See *North Dakota* v. *United States Army Corps of Eng'rs*, petition for cert. pending, No. 05-628 (filed Nov. 14, 2005). The federal respondents are filing separate briefs in opposition to those petitions for writs of certiorari.

lation, the Act authorized the Corps to build and operate a series of six dams and associated reservoirs, known as the Main Stem System, along the upstream portion of the river in Montana, North Dakota, South Dakota, and Nebraska.[2] The Act authorizes the Corps to contract for the use of surplus water available at the reservoirs, 33 U.S.C. 708, and to "prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs," provided that "the operation of any such project shall be in accordance with such regulations," 33 U.S.C. 709. The Act and its legislative history identify various purposes that the Corps is to serve in operating the Main Stem System, including flood control, provision of hydroelectric power, irrigation, recreation, navigation, protection of the water supply and water quality, and preservation of fish and wildlife. See, *e.g.*, *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 499-502 (1988).

The Corps has developed a water-control plan for operation of the Main Stem System, which is embodied in the Missouri River Main Stem Reservoir System Master Water Control Manual (commonly known as the Master Manual). Pet. App. 35. The Master Manual was first published in 1960 and was revised in 1973, 1975, and 1979. *Ibid.* The Master Manual sets forth general

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[2] The six Main Stem System dams are as follows (with the associated reservoirs identified in parentheses): Garrison Dam (Lake Sakakawea), Oahe Dam (Lake Oahe), Big Bend Dam (Lake Sharpe), Fort Randall Dam (Lake Francis Case), Gavins Point Dam (Lewis and Clark Lake), and Fort Peck Dam (Fort Peck Lake). Congress authorized construction of the Fort Peck Dam in Montana in the earlier River and Harbor Act of 1935, ch. 831, 49 Stat. 1028, for the purpose of flood control and navigation; in 1938, Congress amended that statute to add the purpose of providing hydroelectric power, see Act of May 18, 1938, ch. 250, 52 Stat. 403.

guidelines for operation of the Main Stem System; in addition, each year, the Corps promulgates an Annual Operating Plan, which details its plans for the coming year. *Id.* at 7.

2. For several years beginning in the late 1990s, the Missouri River Basin experienced prolonged drought conditions, which forced the Corps to make decisions about the allocation of water among competing interests. Pet. App. 36. In 2002, petitioners sought and obtained preliminary injunctions in federal district court requiring the Corps to limit discharges from, and maintain water levels in, reservoirs within their respective States, in order to protect stocks for recreational fishing in those reservoirs. In the underlying lawsuits, petitioners claimed, *inter alia*, that the Corps' actions violated the Flood Control Act and the then-applicable 1979 version of the Master Manual.

The court of appeals vacated the preliminary injunctions. *South Dakota* v. *Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003). The court of appeals rejected the Corps' arguments that determinations about the operation of the Main Stem System were committed to agency discretion and therefore unreviewable. *Id.* at 1027-1030. Although the court recognized that "[t]he Flood Control Act clearly gives a good deal of discretion to the Corps in the management of the River," the court held that "[the Corps'] discretion is not unconstrained" because "the Act lays out purposes that the Corps is to consider in managing the River." *Id.* at 1027. The court noted that "[t]he Act recognizes what the Supreme Court has called the dominant functions of the River's reservoir system—flood control and navigation." *Ibid.* (citing *ETSI Pipeline*, 484 U.S. at 512). The court added, however, that "the Act also recognizes recreation and other inter-

ests and secondary uses that should be provided for" and that "[the Act] calls on the Corps to balance these various interests." *Ibid.* "What the text of the Act does not provide," the court concluded, "is a method of deciding whether the balance actually struck by the Corps in a given case is correct or not." *Ibid.* Although the court of appeals held that the Corps' actions were reviewable, it vacated the preliminary injunctions on the ground that petitioners were unlikely to succeed on the merits. *Id.* at 1030-1032. The court specifically rejected South Dakota's contention that, under the Flood Control Act, the Corps was required to "maximize[] the benefits to all interests." *Id.* at 1030. The court reasoned that the practical implication of that position would be to accord the Corps' decisions no deference at all. *Ibid.* The court remanded for proceedings on the merits of petitioners' claims. *Id.* at 1033. This Court denied review. 541 U.S. 987 (2004).

3. While the court of appeals was considering the Corps' appeal, other parties filed lawsuits in various district courts, also seeking to compel the Corps to alter its operation of the Main Stem System. The Judicial Panel on Multidistrict Litigation consolidated all of the lawsuits for pretrial proceedings before a single court in the District of Minnesota. *In re Operation of the Missouri River Sys. Litig.*, 277 F. Supp. 2d 1378, 1379 (2003).

The Minnesota district court ordered the Corps to issue a revised version of the Master Manual by March 19, 2004. Pet. App. 35 n.1. The Corps complied with that order and issued the revised version, which it had been preparing for many years. *Id.* at 35. Once the Corps formally adopted the 2004 version of the Master Manual, the plaintiffs filed amended complaints, and the

parties filed cross-motions for summary judgment. As is relevant here, Nebraska, Missouri, and other downstream parties claimed that the 2004 Master Manual violated various statutes, including the Flood Control Act of 1944. Although petitioners themselves brought other claims,[3] they defended the Corps' promulgation of the 2004 Master Manual as a proper exercise of the Corps' discretion under the Flood Control Act.

The district court granted the federal defendants' motion for summary judgment on all of the pending claims. Pet. App. 35-89. As is relevant here, the district court rejected the downstream parties' Flood Control Act claims. *Id.* at 39-44, 46. The court explained that, under the court of appeals' earlier decision in *Ubbelohde*, it "may only review the Corps' actions to ensure that the Corps considered all river interests when formulating a given plan." *Id.* at 41. The court reasoned that "the [Act] does not impose a non-discretionary duty to maintain minimum navigation flows or season lengths," *ibid.*, and concluded that "prioritization of river interests is discretionary," *id.* at 42. The court further recognized that the Corps had reserved the authority to deviate from the Master Manual in the event of changed

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[3] North Dakota claimed that the Corps' operations violated state-law water-quality standards. In a separate set of opinions, the district court granted the federal defendants' motion to dismiss that claim, *In re Operation of the Missouri River Sys. Litig.*, 320 F. Supp. 2d 873 (D. Minn. 2004), and the court of appeals affirmed, 418 F.3d 915 (8th Cir. 2005). South Dakota claimed that the Corps' operations violated the O'Mahoney-Millikin Amendment, 33 U.S.C. 701-1(b), which prohibits any use of Missouri River waters in States west of the 98th meridian for certain navigation purposes where that use conflicts with a beneficial consumptive use for certain other purposes. The district court granted the federal defendants' motion for summary judgment on that claim, Pet. App. 44-46, and South Dakota did not appeal.

circumstances, but it concluded that any such deviation would be subject to judicial review. *Id.* at 43-44.

4. On appeal, North Dakota and South Dakota participated solely as appellees, again defending the Corps' promulgation of the 2004 Master Manual as a proper exercise of the Corps' discretion under the Flood Control Act. See, *e.g.*, North Dakota C.A. Br. 1 (noting that, while "North Dakota * * * is deeply displeased with the new Manual," "we acknowledge that Congress has given the Corps some discretion in managing the river," and adding that "[a]ll of the decisions challenged by the downstream interests * * * were well within the governing statutory framework"); South Dakota C.A. Br. 12 (contending that the prior version of the Master Manual was "in contravention of the [Act]," but conceding that the new version "will provide some relief if the Corps manages the reservoirs as stated").

The court of appeals affirmed in relevant part. Pet. App. 1-34. On the downstream parties' Flood Control Act claim, the court of appeals agreed with the district court that "the [Act] imposes no duty to maintain a minimum level of downstream navigation independent of consideration of other interests." *Id.* at 15. The court noted, as it had in its earlier decision in *Ubbelohde*, that flood control and navigation were the "dominant functions" of the Flood Control Act, but it added that the Act "does not set forth what level of river flow or length of navigation season is required to make navigation 'dominant' over a 'secondary' interest such as recreation." *Ibid.* The court therefore concluded that the Corps was required merely to consider all of the relevant interests, not to strike a particular balance among those interests, before making its management decisions. *Ibid.*

The court of appeals then held that the 2004 Master Manual complied with that requirement. Pet. App. 16. The court recognized that, under the 2004 Master Manual, navigation support would be reduced or eliminated if the amount of water stored in the reservoir system fell below the amount necessary to "meet authorized purposes during significant multi-year drought periods." *Ibid.* The court noted, however, that, according to the Corps' estimates, that provision of the Master Manual would lead to the elimination of the entire navigation season in only four out of every 100 years, and the shortening of the navigation season in another eight. *Ibid.* "Under these circumstances," the court concluded, "we cannot say that the Corps failed to consider downstream navigation before making its decision." *Ibid.*

In a footnote, the court of appeals reiterated that the Flood Control Act treated flood control and navigation as dominant functions. Pet. App. 16 n.7. The court then stated that, "[i]f, due to extreme conditions, the Corps is faced in the future with the unhappy choice of abandoning flood control or navigation on the one hand or recreation, fish and wildlife on the other, the priorities established by the [Act] would forbid the abandonment of flood control or navigation." *Ibid.* "[W]e do not rule out the possibility," the court added, "that some more limited degree of support for flood control or navigation in the future could be held to constitute 'abandonment' of these dominant functions." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 13-24) that the Flood Control Act of 1944 does not require the Army Corps of Engineers to give priority to navigation over other functions in managing the waters of the Missouri River Ba-

sin. The court of appeals, however, held only that the 2004 Master Manual, which balances navigation with other interests, did not violate the Flood Control Act. To the extent that language in the court of appeals' opinion suggests that the "abandonment" of navigation would violate the Flood Control Act, that language is essentially dictum addressing a situation that may never occur. Further review is therefore unwarranted.

1. Petitioners assert (Pet. 15) that the court of appeals held that the Act requires the Corps to give priority to navigation over other functions. That assertion is erroneous. Although the court of appeals did note that navigation was a "dominant function" of the Act, Pet. App. 15 (citing *ETSI Pipeline*, 484 U.S. at 512),[4] it did not hold that the Corps was required to give priority to navigation at the expense of other functions in the ordinary operation of the Main Stem System; instead, it stated only that Corps was required to "consider[]" each of the statutory functions, and strike a balance among those functions, in its management decisions, *ibid.* Because the Corps had considered all of the statutory functions, including navigation, in devising the 2004 Master Manual, the court ultimately held that the 2004 Master Manual did not violate the Act—even though it contemplated the possibility of reducing water flows to an ex-

[4] As petitioners note (Pet. 17-19), in *ETSI Pipeline*, the Court stated that one of the plans proposed before passage of the Flood Control Act "recognized that the 'dominant function' of Lake Oahe and the other main-stem reservoir projects would be flood control and navigation." 484 U.S. at 512. The Court's description of the "dominant function" of the reservoirs was relevant in determining whether operation of the Main Stem System would come within the jurisdiction of the Corps or the Department of the Interior. See *ibid.* The Court, however, did not address any issue pertaining to the Corps' own balancing of competing uses of water.

tent that would restrict or eliminate navigation under certain conditions. *Id.* at 16.

To be sure, in a footnote, the court of appeals suggested that the Corps would be forbidden from abandoning navigation *altogether* (and left open the question whether support for navigation that fell short of what was provided for in the Master Manual could constitute abandonment of navigation). Pet. App. 16 n.7. Like the language in the text of the opinion stating that navigation was a "dominant function" of the Act, however, that language was not essential to the holding of the case. It is a long-established principle that this Court "reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); accord *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945); *J.E. Riley Inv. Co.* v. *Commissioner*, 311 U.S. 55, 59 (1940); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827); *M'Clung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821). Moreover, to the extent that the court of appeals suggested that the Corps would be forbidden from abandoning navigation altogether, petitioners do not suggest that the Corps intends, or is likely, to abandon navigation altogether in the future. Because any harm to petitioners from the court of appeals' decision is thus entirely speculative, and because petitioners obtained the *holding* that they sought from the court of appeals (*i.e.*, a holding that the 2004 Master Manual did not violate the Flood Control Act), further review is not warranted at this time.

2. Petitioners correctly note (Pet. 11) that, in the brief in opposition to petitioners' petition for a writ of certiorari from the court of appeals' earlier decision in *Ubbelohde*, the federal respondents argued that this

Court should deny review on the ground, *inter alia*, that the court of appeals' decision was interlocutory. See Br. in Opp. at 16, *North Dakota* v. *Ubbelohde*, cert. denied, 541 U.S. 987 (2004) (No. 03-935). Unlike the decision below, however, the court of appeals' earlier decision in *Ubbelohde* involved a holding that was actually adverse to petitioners: *viz.*, that they were not entitled to preliminary injunctions on their underlying claims that the Corps' actions violated the Flood Control Act and the then-applicable 1979 version of the Master Manual. See 330 F.3d at 1027-1032. Those claims were effectively superseded when the Corps promulgated the 2004 version of the Master Manual, which, unlike the 1979 version, did not expressly provide that navigation had priority over recreation. See *id.* at 1020. And in the brief in opposition in *Ubbelohde*, the federal respondents also argued that the Court should deny review because the court of appeals reasoned that the Flood Control Act required the Corps only to *consider* all of the enumerated statutory functions, not to give *priority* to navigation over other functions in the ordinary operation of the Main Stem System. See Br. in Opp. at 15, *Ubbelohde*, *supra*. If further review was unwarranted in *Ubbelohde*, therefore, it is *a fortiori* unwarranted here, where the reasoning below was similar but where the holding below was affirmatively in petitioners' favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2006

No. 05-611

FEB 14 2006
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF NORTH DAKOTA
and STATE OF SOUTH DAKOTA,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE MANDAN, HIDATSA, AND ARIKARA NATION AND THE CHEYENNE RIVER SIOUX INDIAN TRIBE IN SUPPORT OF PETITION FOR CERTIORIARI

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INTEREST OF AMICI CURIAE

I. The destruction of Amici Curiae reservations in the 1950's.

The Mandan, Hidatsa, and Arikara Nation and the Cheyenne River Sioux Tribe (collectively referred to hereinafter as "the Tribes") had in excess of 259,000 acres of their best bottomlands along the Missouri River flooded by the United States under the Flood Control Act of 1944. As a long-time, widely-respected observer of U.S.-tribal relations stated: "The Pick-Sloan Plan was, without doubt, the single most destructive act ever perpetrated on any tribe by the United States." Vine Deloria, Jr., *Foreward*, Michael L. Lawson, *The Pick-Sloan Plan and the Missouri River Sioux, 1944-1980* at xiv (1982). These lands, containing homes, community buildings, and farms, had been protected by the United States under the 1851 Treaty of Fort Laramie, 11 Stat. 749 (Mandan, Hidatsa, and Arikara Nation), and the 1868 Treaty of Fort Laramie, 15 Stat. 635 (Cheyenne River Sioux Tribe), but were nonetheless destroyed to create the enormous Lakes Sakakawea and Oahe. Pub. L. 83-776, 68 Stat. 1191 (1954) (Cheyenne River); Pub. L. 81-437, 63 Stat. 1028 (1953) (Mandan, Hidatsa and Arikara Nation).

The role of the bottomlands and the harm caused by removing Indian people from these lands on the Missouri River has been studied and told. It appears in broad studies such as Michael L. Lawson, *The Pick-Sloan Plan and the Missouri River Sioux, 1944-1980* (1982), and Roy V. Meyer, *Fort Berthold and the Garrison Dam*, 35 N.D. History 216 (1968), and in more closely focused studies, such as Christyann Ranck Maxfield, *Goodbye to Elbowoods: The Story of Harold and Eva Chase* (1986), and Paul VanDevelder, *Coyote Warrior: One Man, Three Tribes,*

and the Trial that Forged a Nation (2004). It has been recognized by Congress in the legislative history and the enactment of such Acts as the Cheyenne River Sioux Tribe Equitable Compensation Act, Pub. L. 106-511, § 102, 114 Stat. 2365 (2000). Much of what follows is from these sources.

The loss of Missouri River bottomlands and removal of Indian citizens to the wind-swept plains above the river, was traumatic.[1] The relocation "caused chaos and heartache." *Id.* at 51. It touched every aspect of tribal life.[2]

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[1] The dam "destroyed more Indian land than any other public works project in America." Lawson, *supra*, at 50. The Mandan, Hidatsa and Arikara Nation lost in exess of 155,000 acres and the Cheyenne River lost 104,420 acres. The inundation destroyed choice grazing land of 75% of the ranchers on Cheyenne River. Over 180 families and 30% of the tribal population on the Cheyenne River Sioux Reservation were forced to leave their homes. *Id.* at 51. The reservation's largest town and two smaller ones were submerged. *Id.* at 50. BIA and tribal facilities were moved 60 miles inland. *Id.* The dams destroyed a substantial portion of the Sioux's most valuable resources. *Id.* at 41. Wild game and natural plant supplies, for example, were reduced by 75%. *Id.* at 56.

[2] When Lake Sakakawea began to fill in 1954, 85% of the members of the Mandan, Hidatsa, and Arikara Nation were forced to move. Meyer, *supra*, at 233. Of the 531 tribal homes, 436 were flooded. VanDevelder, *supra*, at 116. The Fort Berthold communities of Elbowoods, Nishu, Beaver Creek, Red Butte, Charging Eagle, Lucky Mound, Independence, and Shell Creek were wiped from the map. Maxfield, *supra*, at 29. Church cemeteries and 27 private burial grounds were relocated. Meyer, *supra*, at 289. The inundation even caused the government to relocate the graves of those Indians that served the U.S. Army over a hundred years ago – the Scouts Cemetery was moved. *Id.* The town of Elbowoods contained the reservation hospital, a boarding school, the high school, and a day school, all of which were lost and had to be replaced. *Id.* at 267. Seven other day schools were lost on Fort Berthold and every Mandan, Hidatsa, and Arikara child had to change schools. *Id.* In the early 1940's, a BIA

(Continued on following page)

At the outset of forced compensation negotiations with the United States in 1953, the Cheyenne River Sioux Tribal Chairman, Frank Ducheneaux, said: "'This is not a happy occasion. We are here to participate in the gutting of our reservation.'" Lawson, *supra* at 80. Indeed, what some tribal members refer to as "The Flood," left them "materially and spiritually impoverished." Deloria, *supra*, at xii. *See also* Meyer, *supra*, at 284, 354; Lawson, *supra*, at 58, 134, 198.

II. Subsequent efforts of the Amici Tribes to recover.

Congress has acknowledged in recent legislative enactments that the Tribes were unfairly forced to give up their most fertile and populated lands for grossly inadequate compensation and that the Tribes have not participated in the Basin's economic development, one of the major goals for constructing Missouri River dams. Pub. L. 102-575, Title XXXV, 106 Stat. 4731 (1992) (Mandan, Hidatsa, and Arikara Nation); Pub. L. 106-511, § 102(a)(2)(C), 114 Stat. 2365 (2000) (Cheyenne River Sioux Tribe).

The Tribes reside in one the most isolated regions of the Country. Due to loss of fertile bottomlands, each Tribe has suffered prolonged economic deprivation resulting in

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survey found that life on the Fort Berthold Reservation was better than that in surrounding non-Indian communities, but just 20 years later, the subsistence economy had been "shattered" and the Indians' "material and social needs, once met with agricultural abundance and tight-knit communities, had crumbled." VanDevelder, *supra*, at 93, 173. The forced relocation of the Mandan, Hidatsa, and Arikara effectively wiped out a century of progress. VanDevelder, *supra*, at 173. They went from being one of the only self-sufficient Tribes to being one almost wholly dependent on outside help. *Id.* at 183.

the Nation's highest unemployment rates. In an effort to reverse these severe economic conditions, each has invested in lake recreation to attract tourists and generate employment for tribal members. In so doing, each has relied on the plain reading of the Flood Control Act of 1944, and subsequent amendments, to require Upper Basin lake releases only when necessary to preserve a substantial navigation economy in the lower river and when such releases can be done consistent with maximizing economic and social benefits to other users. 33 U.S.C. § 701-1; Cert. Pet. at 90-112. Each has also relied on the Acts of Congress that, while taking their lands, reserved tribal access to and recreation on the reservoirs. *See, e.g.*, Pub. L. 81-437, § 11, 63 Stat. 1028, (Mandan, Hidatsa, and Arikara; inundation to takings line with no express right of access but access freely utilized with permission of the United States for over 50 years); Pub. L. 83-776, § 10, 68 Stat. 1193 (1954) (Cheyenne River Sioux Tribe).

As noted in North and South Dakota's Petition for Certiorari, the Tribes have major water intake structures to provide safe and reliable drinking water to the residents of the Reservation located on the Missouri River.[3] All of

[3] Details on the water supply crisis are provided here because, at the time of this Appeal and creation of the Administrative Record below, the water crisis and drought were not as severe and consequently, the water supply problems were not as severe. Since the creation of the Administrative Record, the Cheyenne River Sioux water intake serving 14,000 residents is currently experiencing water quality violations. It may fail as early as August 2006. Haugen, Doris, *Indian Reservation in South Dakota Faces Water Crisis*, New York Times, *May 20, 2005*. The Corps of Engineers has provided $8.45 million while the Tribe and other federal agencies have contributed over $7.5 million for a total of almost $16 million to construct a replacement intake in deeper waters. That intake will not be finished and operational until at least August 2006. The Corps of Engineers has issued a Project Information Report

(Continued on following page)

these intakes are under threat of failure, and some are experiencing ongoing water quality violations as lake levels have continued to decline with releases for navigation. These intakes serve thousands of people with no other source of safe and reliable drinking water. Cert. Pet. at fn. 4. These concerns obviously implicate not just competing economic or aesthetic interests, but rather, the fundamental health of the Missouri River's poorest residents.

The operation of the River under the Court of Appeals decision fixing forever navigation as a "dominant" trump card threatens both domestic water supply and lake recreation. Accordingly, the Tribes support the Petition of North and South Dakota to have the Court determine, 62 years after Congress enacted the Flood Control Act, Congress' long term plan for allocating the waters of the Missouri River. When Upper Basin releases can never support a substantial lower river navigation economy (as is the case in this Century), the Flood Control Act by its own words directs that the River is to be managed on the basis of the relative value of the competing uses to the overall United States economy. *Operation of the Missouri River System Litigation*, 421 F.3d 618, 629-630 (2005).

The experience of Indian people under the Flood Control Act needs to be told. That long and painful story

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documenting the severity of this problem and designating this an emergency project. Water quality violations are recorded with the United States Environmental Protection Agency and the Corps of Engineers. There are no alternative clean water sources other than the Missouri River due to contamination of tributaries by non-tribally controlled entities and lack of potable water from wells due to the lack of shallow aquifers under the Reservation.

makes clear the importance – for the Tribes – of the issue presented in the Petition. If the Court does not review the decision below, what little the Flood Control Act of 1944 left for Indian Tribes of the Upper Missouri River will be lost forever.

SUMMARY OF ARGUMENT

The Court of Appeals decision rewrote Congress' plan to provide the Tribes and others in the Upper Basin ample water supplies for Lake access, recreation and consumptive beneficial uses, so long as sufficient water supplies were released to maintain a substantial lower river navigation economy. In lieu of this Congressional compromise, the Court of Appeals, relying on erroneous dictum of this Court in *Etsi Pipeline Corporation v. Missouri*, 484 U.S. 495 (1988) directed that navigation be treated as a "dominant" interest. *Operation of the Missouri River System Litigation*, 421 F.3d at 629-30. The Tribes and their non-Indian neighbors are entitled to a full and careful construction by this Court of Congress' plan for allocating Missouri River water as set forth in the 1944 Flood Control Act, as amended – an analysis never made by the Court of Appeals.

ARGUMENT

1. The Tribes have relied upon Congress' commitment on the face of the Flood Control Act of 1944, as amended, particularly 33 U.S.C. § 701-1 and 33 U.S.C. § 701-1(b) to require Upper Basin Lake releases for down river navigation only when necessary to preserve a substantial benefit to navigation and only when such releases will not impair Upper Basin consumptive uses. Those commitments – ignored by the Court of Appeals – are essential to properly allocate Missouri River waters.

The Tribes read the plain language of the 1944 Flood Control Act, as is required, as a long-term, multipurpose authorization to develop the Missouri River Basin for the benefit of all present and future residents.[*] Indeed the Act so states:

> [I]t is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and

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[*] This reading of the 1944 Flood Control Act is confirmed by the recent enactment of the Cheyenne River Tribe Equitable Compensation Act of 2000, in which Congress declared that, "by enacting the Act of December 22, 1944, commonly known as the "Flood Control Act of 1944", Congress approved the Pick-Sloan Missouri River Basin Program – (A) to promote the general economic development of the United States. . . . " Pub. L. 106-511, § 102(a)(1)(A), 114 Stat. 2365 (2000).

> coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

33 U.S.C. § 701-1; *see also*, N.D. Cert. Pet. at App. 90.

Congress in the Flood Control Act focused on how federal dams were to interact with then existing uses of the Missouri River. Established and potential uses were to be protected "to the fullest possible extent" and separately the dams could be used to benefit navigation, if that navigation were to provide substantial economic benefits. 33 U.S.C. § 701-1. Congress subsequently directed that navigation releases cannot impair "upstream beneficial consumptive uses" in States wholly or partially West of the 98th Meridian – which includes North and South Dakota and the territories of the Tribes. 33 U.S.C. § 701-1(b).7

These statutory directives – including the limitation on Missouri River water for navigation releases – were ignored when the Eighth Circuit ruling set in place a water allocation regime favoring the small navigation interest still functioning in the lower 20% of the River regardless of the "relative economic value" of competing uses and ignored the requirement that such navigation be substantial, by categorically designating navigation as a "dominant" purpose. 421 F.3d at 629.

Congress did not limit its directives to protecting then existing uses and limiting dam releases to only that amount necessary to sustain what might in 1944 become substantial navigation. To the contrary, in order to put all

residents of the Missouri River Basin on notice that a clear purpose of the Flood Control Program includes the creation and preservation of lake recreation, Congress inserted the following directive in Section 4 of the Flood Control Act of 1944.

> The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreation purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary.

Flood Control Act of 1944, 58 Stat. 889-890 (1944); Cert. Pet. at App. 94-95.

In understanding the Act then, it is important to distinguish between River uses which pre-existed the 1944 Flood Control Act and those uses which would be created by facilities constructed under the Act. Navigation pre-existed the dams constructed, while reservoir recreation did not as there were no reservoirs. As to the former, Congress was willing to spend public funds only if such navigation became, subsequent to 1944, substantial. As to the newly created reservoirs, Congress contemplated that new uses created by the reservoirs would be "preserved and protected." 33 U.S.C. § 701-1.

This understanding of the Flood Control Act of 1944 was turned upside down by the Court of Appeals when it stated, "If, due to extreme conditions, the Corps is faced in the future with the unhappy choice of abandoning flood control or navigation on the one hand or recreation, fish

and wildlife on the other, the priorities established by the FCA would forbid the abandonment of flood control or navigation." 421 F.3d at 629.

In order to ensure that newly created reservoirs are maintained for ready access by the public, the United States Corps of Engineers continues to take appropriate steps to secure recreation access, subject to protection of Tribal treaty rights and compliance with other federal laws. 36 C.F.R. § 327.1 (2005).

Over the years, the Tribes have invested some of their limited resources in enhancing the Lake Sakakawea and Lake Oahe fisheries and water access to expand lake recreation. These efforts include construction of a boat ramp at Cheyenne River that is currently thirty feet out of the water. They have contributed to a river recreation and fisheries economy that has an annual value of $87 million and is expanding, while downstream navigation peaked in 1977 and since then has continuously declined to an annual value that could be as low as $1-2 million. Cert. Pet. at 6-7.

The longer the Courts wait to give a thorough and complete construction as to how Missouri River waters are to be allocated under the Flood Control Act, the greater the pain for the Tribes who depend almost exclusively on the Missouri River, out of necessity, for clean drinking water, and who have invested so much in what they and the United States understand as a plan set forth by Congress to allocate Missouri River waters without rigidly favoring any one river use.

2. In lieu of conforming to Congress' plan, The Court of Appeals eliminated these two Congressional limitations on Upper Basin releases to support down river navigation, relying on erroneous dictum in *Etsi Pipeline Project v. Missouri* and in so erring, rendered a crippling blow to low-income Indian and non-Indian residents of the Dakotas who lost their most valuable land to Missouri River dams.

The Court's holding in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988), never addressed the Tribes' rights to water supply, water access and recreation. It never addressed the appropriate allocation of water in the Missouri River between the Upper Basin citizens and governments, Indian and non-Indian, who were forced to sacrifice hundreds of thousands of acres of their best lands to largely benefit the Lower Basin.

ETSI's "navigation priority" comment relied on by the Eighth Circuit is dictum. The Supreme Court has frequently held that dictum is entitled to only the weight of its own persuasion. *E.g., Central Green Co. v. United States*, 531 U.S. 425, 430 (2001) ("The sentence that we have italicized and, in particular, the phrase 'related to flood control' has generated conflicting opinions among the Courts of Appeals. In an attempt to make sense of what is admittedly confusing dicta . . ."); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 393 (1995) ("The quoted characterization . . . was merely set forth at the beginning of the opinion, in describing the factual background of the case. It is hard to imagine weaker dictum"); *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439, 463 n.11 (1991) ("[O]ur remark . . . is obviously not controlling, coming as it did in an opinion

that did not present the question we decide in these cases").

As North and South Dakota have shown, the Court of Appeals chose not to analyze the Flood Control Act of 1944 by reference to the actual words used by Congress, nor by reference by the Corps of Engineers' understanding, the agency that built the dams and has managed the River for over 50 years. *See* Cert. Pet. at 22-23 (explaining the United States' consistent view that the Act did not set priorities and that navigation is not a preferred use). Instead the Court of Appeals relied, without analysis, on this Court's dictum in *ETSI Pipeline*. The Tribes have never understood *ETSI*, a dispute between the competing management functions of two federal agencies, to have constituted final and unequivocal notice to pursue lake recreation, subsistence fishing, and consumptive beneficial uses, at their own risk. They and other rural residents of what is an economically disadvantaged area of this country have reasonably relied on Congress' own words.

Accordingly, the Court should give a full and careful hearing on the actual language of the Flood Control Act of 1944, and how Congress intended to advance Upper Basin economic activities as a central component of the Missouri River dam construction program. The Court of Appeals never reached that question and this Court, having in *ETSI* unintentionally limited the inquiry of the lower courts, should undertake a careful examination of the statutory language of the 1944 flood Control Act as amended and Congress' plan for the Missouri River.

At a 1945 Senate hearing, George Gillette, Chairman from Fort Berthold, stated: "'We will gain nothing from this dam but our own destruction.'" VanDevelder, *supra*,

at 118. He was prophetic. But the Tribes have now sought to rebuild something from that which caused so much harm. They seek to recover from Missouri River fisheries some vestige of economic self-sufficiency. By developing the lakes for tourism and securing long term domestic water supplies from the River, they seek to regain some economic vitality the River once provided. Their efforts to recover from the economic destruction wrought by the dam construction and operations to date will be fruitless if the Corps is required, under a static and erroneous reading of the Flood Control Act by the Court of Appeals, to operate the River forever to preserve a downstream barge industry which never provided substantial economic benefits and today is rapidly vanishing in importance.

CONCLUSION

The Amici Indian Tribes respectfully request that the Court grant the Petition.

Respectfully submitted,

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Counsel of Record

February 14, 2006

No. 05-611

In the
SUPREME COURT OF THE UNITED STATES

State of North Dakota and
State of South Dakota
Petitioners,

v.

U.S. Army Corps of Engineers, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE STATE OF MISSOURI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND STATEMENT

Missouri and petitioners North and South Dakota ("the Dakotas") have very different views of the Flood Control Act of 1944 and the substantive meaning of the Missouri River Master Water Control Manual ("Master Manual"), the rule that sets out the manner in which the United States Army Corps of Engineers ("Corps") is to manage the water system that a series of dams created from the formerly free-flowing Missouri River. The views are largely the result of the dramatically different approaches that Dakota and Missouri citizens have taken to life on the River.

In Missouri, agriculture has flourished along the River. Farmers rely on the dams to prevent flooding of their land and to provide the continuous flows that make it possible to transport bulk materials – including fertilizers and crops – inexpensively. Farmers and shippers make long-term investments premised on the Master Manual, published by the Corps to satisfy the congressional mandate embodied in the Flood Control Act. Each year, in late winter, shippers, warehousemen, and navigators enter into contracts for the delivery of goods on the Missouri River – contracts that necessarily depend on the river flows promised by the Master Manual.

While farming has flourished in Missouri, under the management of the Corps and pursuant to the Master Manual a recreation industry has flourished in the upstream states. Instead of corn and soybeans, the product is tourism revenue, produced in part by fishing for walleye, a nonnative game fish that feeds on a small forage fish, the rainbow smelt. The smelt spawns in water only inches deep along the shores of the big lakes. The Dakotas tell this Court that a multimillion dollar recreation industry hinges on this tiny minnow. Like farmers in Missouri, those establishing businesses based on walleye fishing in the Dakotas proceed with full knowledge of the Master Manual and the manner in which it requires the Corps to manage the river. And despite some recent difficulties, the Dakota businesses have obviously thrived under the Master Manual regime.

Management under that regime and the Corps' recent process to update the Master Manual have resulted in a torrent of litigation among Missouri, the Dakotas, other states, and interested parties. The issue raised by this petition was first considered in litigation commenced by the Dakotas against the Corps that ultimately involved Nebraska, Missouri, and many others. Those cases arose out of the Corps' management under the prior Master Manual.[1] The Dakotas obtained injunctions from their respective federal district courts prohibiting releases from dams situated in the Dakotas, while Nebraska obtained an injunction from its federal district court requiring the Corps to maintain downstream river flows. The Eighth Circuit consolidated those cases for review and addressed the precise issue the Dakotas present in their petition, in *South Dakota, v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), *cert. denied, North Dakota v Ubbelohde*, 514 U.S. 987, 124 S. Ct. 2015 (2004).

To address the claims before it in *Ubbelohde*, the Eighth Circuit first had to construe the Flood Control Act of 1944, which granted the Corps the authority to manage the Missouri River system. The court held that flood control and navigation were the dominant functions of the Flood Control Act, and ruled against the Dakotas. This Court denied the Dakotas' petition for writ of certiorari. *Id.* at 1019-20.

Subsequent to the Eighth Circuit's decision in *Ubbelohde*, a number of different parties commenced more litigation. This litigation focused primarily on the development by the Corps of the updated 2004 Master Manual. The Judicial Panel on Multidistrict Litigation consolidated these cases in the District of Minnesota. *In re Operation of the Missouri River System Litigation*, 277 F. Supp. 2d 1378 (J.P.M.L. 2003). Ultimately, the Corps and other federal defendants moved for summary judgment, which the district court granted. *In re Operation of the Missouri River System Litigation*, 363 F. Supp. 2d 1145 (2004) (Petition Appendix ("Pet. App.") at 35). That decision led to an appeal to the Eighth Circuit and the decision

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[1]The Corps has since updated the Master Manual, giving rise to the current litigation over the 2004 Master Manual.

by the Eighth Circuit targeted by this petition. Although the Dakotas attempted to revisit the issue of the proper construction of the Flood Control Act that had been decided in *Ubbelohde*, neither the district court nor court of appeals saw fit to reconsider *Ubbelohde*. Petition at 15. Instead, both courts reaffirmed the holding in *Ubbelohde*. 421 F.3d at 624 (Pet. App. at 15); 363 F. Supp. 2d at 1153 (Pet. App. at 42-43).

REASONS TO DENY THE WRIT

The Dakotas ask this Court to consider whether the Eighth Circuit in *Ubbelohde* correctly held, consistent with this Court's decision in *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495 (1988), that flood control and navigation are the "dominant functions" of the Missouri River reservoirs and that those congressional project purposes are entitled to preferential treatment over recreation, a subordinate and ancillary project purpose, in the management of the Missouri River under the Flood Control Act of 1944. This Court already declined to consider this question when it denied *certiorari* in *Ubbelohde*. Petitioners do not identify anything that would change the analysis or otherwise make this issue more appropriate for review now.

While the Eighth Circuit in this case reaffirmed the validity of *Ubbelohde*, it did so in the context of denying the motions of Nebraska, Missouri, and another party for summary judgment. 421 F.3d at 629 (Pet. App. at 15). None of these parties seek review of that decision. The court did not consider the issue in the context of any claim made by petitioners. (Pet. at 15) Nevertheless, petitioners ask this court to consider the *Ubbelohde* decision, but do not explain why that is necessary in the context of this case. There are two reasons petitioners' request should be denied.

First, even if the Court were to grant this petition and consider the holding in *Ubbelohde*, it would not change the outcome in this case. The petitioners do not argue in their petition that the Corps' balancing of interests in developing the Master Manual was improper, nor do they suggest that overruling *Ubbelohde* would

cause the Corps to revise the Master Manual or its management of the system. Any decision on this petition would be advisory only.

Second, Petitioners do not make a serious attempt to find a conflict between the decision of the Eighth Circuit and any decision by this or any lower court. Rather, the Dakotas treat this as if it were an original jurisdiction action for equitable apportionment of the Missouri River. Petition at 24; *see also* Response of Environmental Defense and National Wildlife Federation in Support of Petition for Writ of Certiorari ("Response") at 1-2. It is not.

1. Even if the holding in *Ubbelohde* were set aside, it would not change the outcome in this case. The Master Manual would still be a binding rule constraining the Corps' discretion. The petition does not challenge the Corps' balancing of interests in adopting the revised Master Manual, but only the court's holding in *Ubbelohde*. *See* Petition at13. The Eighth Circuit in this case held that the revised Master Manual was not arbitrary and capricious because "[t]he Corps' balancing of water-use interests in the 2004 Master Manual is in accordance with the [Flood Control Act]." 421 F.3d at 630 (Pet. App. at 15). There is nothing in the record to suggest - and petitioners do not argue - that the balance struck by the Corps would be any different if *Ubbelohde* were overruled. Indeed, the Eighth Circuit recognized that the impact of *Ubbelohde* on the Master Manual, if any, was prospective and hypothetical - entirely dependent on the occurrence of circumstances that might never come to pass. *See In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 629 n.7 (8th Cir. 2005) (Pet. App. at 16). Therefore, even if this Court were to revisit *Ubbelohde* in response to this petition, the 2004 Master Manual would still govern management of the system.

Even assuming that Congress did not assign relative priorities among conflicting uses in the Flood Control Act, the Dakotas point to nothing that suggests the Eighth Circuit was wrong in leaving the balancing of competing interests to the Corps. In fact, in support of their petition, the Dakotas argue that the Corps and the Master Manual have already adopted petitioners' interpretation of the Flood Control Act. Petition at 22-23. In other words, petitioners

have as much as admitted that this Court would be providing only an advisory opinion were this petition granted.[2]

The State of Missouri does not concede, of course, that the Dakotas are right, and all uses of the River must be treated equally. Besides being impractical or impossible, that approach ignores the overall structure of the Flood Control Act. It assigned the Corps to build and operate projects the "dominant functions" of which were flood control and navigation. Projects for which the "dominant functions" would be irrigation or power production would be built and operated by the Department of Interior. On this point, both the Department of the Interior and the Corps were in complete agreement in *ETSI Pipeline*. 484 U.S. at 512, n.6-7. Of course, the system at issue is controlled by the Corps - not Interior. Consequently, the "dominant functions" of the system are flood control and navigation. That is confirmed by the declaration of policy of the Flood Control Act, where Congress explained why it was authorizing the building of these dams:

> In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, *for navigation or flood control*, as herein authorized . . . .

33 U.S.C. § 701-1 (1944) (emphasis added).

The Dakotas' real complaint - since they are seeking to protect a recreation industry based on a fish introduced only after the reservoirs were completed - must be that the Corps does not manage the reservoirs to meet what they perceive to be the contemporary needs of the basin. If that is a valid criticism (and the State of Missouri does not suggest that it is), it is a criticism to be taken into account by the Corps as it exercises its discretion to manage the

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[2]For this same reason, the arguments made by Environmental Defense and the National Wildlife Federation at pages 4-10 of their Response in support of this petition must be rejected.

system under the constraints imposed by the 2004 Master Manual, or by Congress.[3]

The court below properly applied routine administrative law. It would be judicial activism at its worst to use this petition to revisit the holding in a prior case as a means of usurping the proper exercise of the Corps' discretion granted by Congressional act.

2. The Petition does not suggest any conflict between the decision of the Eighth Circuit and any decision of this Court. Indeed, the petition tries to distinguish this case from *ETSI Pipeline*, the case on which the Eighth Circuit predicated its decision on this issue. *See* Petition at 13, 17-19. Therefore, petitioners cannot argue that their petition should be granted because the Eighth Circuit decision conflicts with this Court's precedents.

The petition also makes no attempt to find a conflict among circuit court decisions. Indeed, there is none. No circuit other than the Eighth has addressed the setting of priorities under the Flood Control Act.

In the event that some other circuit eventually takes up the management of the Missouri River and disagrees with the Eighth Circuit, then the Dakotas or another party may seek a writ of certiorari. But until that time, this Court need not take up controversial and complex Missouri River management questions merely because the river crosses state and district lines.

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[3]In fact, the Response of Environmental Defense and National Wildlife Federation makes manifest the desire to have this Court substitute its judgment for that of Congress and the Corps. They ask this Court to declare the Flood Control Act a living document to be interpreted based on "modern economic and environmental conditions" (Response at 3), rather than on the intent of the Congress that passed the legislation. *compare* Response at 10.

CONCLUSION

For all the foregoing reasons, the Court should deny the writ.

Respectfully submitted.

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February 14, 2006

No. 05-611

RECOVERED COPY

In the
Supreme Court of the United States

STATE OF NORTH DAKOTA and
STATE OF SOUTH DAKOTA,

Petitioners,

v.

US ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

STATE OF MONTANA'S AMICUS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the two-sentence dictum in *ETSI Pipeline*, giving navigation priority at the expense of other uses, should govern how Missouri River waters are allocated?

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INTEREST OF AMICUS CURIAE

From its source at the Three Forks in southwestern Montana to the North Dakota border, the Missouri River flows for more than 400 miles through Montana. Just west of the North Dakota border, the Missouri River's flows are captured by Fort Peck Dam, submerging 250,000 acres of land and storing up to 18.7 million acre-feet of water. Since Montana holds the headwaters of this invaluable natural resource and may suffer injury as a result of any errors in the management decisions regarding the river's reservoir system, Montana shares the interest of North Dakota and South Dakota, supports their petition, and urges the Court to grant the petition for certiorari in order to clarify whether the 1944 Flood Control Act requires the United States Army Corps of Engineers to manage the Missouri River reservoirs by giving navigation a priority at the expense of all other valuable upstream uses.

Attorney General Mike McGrath is the chief legal officer of the State of Montana and one of five members of the State Land Board which governs the use of 5.2 million acres of state-owned land. Mont. Const. art. X, § 4; Mont. Code Ann § 2-15-501 (2005). In his official capacity, the Attorney General has significant responsibility for management of trust resources within Montana and for representing the State of Montana in protecting Montana's resources in the interest of the citizens of the state. Under Montana law, the Attorney

General has the common-law authority to appear in actions affecting the public interest. *State ex rel. Olsen v. Public Serv. Comm'n*, 129 Mont. 101, 283 P. 2d 602, 603 (1955).

In Montana the United States Army Corps of Engineers operates the mainstem Missouri River reservoir at Fort Peck, and the State of Montana manages the water rights, the water quality, the wildlife and fisheries and their critical habitat at the reservoir. In its sovereign capacity the State of Montana has over the past decade brought actions on behalf of its citizens and visitors, participating in related cases in United States District Court challenging the operation of the Missouri River under the 1944 Flood Control Act for more than a decade. *State of Montana v. Kurt Ubbelohde, et al., (Civ. No. 02-70-Blg-RFC) (D. Mont. filed May 13, 2002)); State of South Dakota, et al. v. Needham [later Bornhoft], et al., (Civ. No. 91-26 JDS-BLG) (D. Mont. filed Feb. 4, 1991).*

Montana maintains a current and vital interest in the management of the Missouri River system in a manner that applies the extensive experience of the Corps of Engineers, and provides for an equitable balancing of the uses of the river. The State of Montana supports the petition for writ of certiorari because Montana shares the Dakotas' critical concern that fair and equitable management of the river system is undermined by the Eighth Circuit's application of an erroneous reading of dicta in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988).

REASONS TO GRANT THE WRIT

I. RESPONDENTS HAVE RECOGNIZED THAT THE FLOOD CONTROL ACT REQUIRES ALL USES BE GIVEN EQUAL PRIORITY.

In its decision below, the court laid the foundation for intensified management conflict among the Basin States by misreading the 1944 Flood Control Act, based on a two-sentence dictum in *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988). (Pet. App. at 15.) Moreover, the decision below misapplies the 1944 Flood Control Act and ignores the equal priority of uses that the Corps itself, as long ago as 1991, acknowledged it must make.

In earlier litigation over management of the Missouri River, the Upper Basin states filed suit in the United States District Court in the District of Montana, *State of South Dakota, et al. v. Needham*, Civ. 91-26-JDS-BLG, Order at 3. (D. Mont. Feb. 4, 1991.) Although the District Court dismissed the matter without prejudice, it did so after concluding, "the Corps has agreed to give all water uses equal consideration while the Master Manual review is undergoing a revision" and the court further stated that "plaintiffs have obtained an acknowledgement by defendants that all current Missouri River water uses will receive equal consideration during review of the Master Manual.

Moreover, there is a reasonable expectation that the Corps' revised plan will reflect contemporary uses and needs of the Missouri River Basin." *Id.* Order at 3. The United States District Court stated, "all uses are to receive equal consideration." *Id.* at 4.

Furthermore, in granting navigation a priority as a matter of law, the court below reached a conclusion at odds with the government's previously articulated position that recognized the Corps' discretion to balance interests in the river operation plan. The United States argued, "There is no statement in the Act . . . or in *ETSI* that navigation is always entitled to priority over the other needs of the river for fish and wildlife." (Sept. 2002 Consol. Reply Br. of United States, Defendants-Appellants at 10; Pet. at 23.)

The court below largely ignored what Petitioners appropriately argue: that the 1944 Flood Control Act provides for the balancing of the various services the river system provides. (Pet. at 3.) In support, the Petitioners state that navigation is but one of the uses for the recommended "multiple-purpose" facilities, and that the reservoir plan was to provide for the "most efficient" uses of the river "for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." Pick Plan H.R. Doc. No. 78-475, 26-30 (1944).

The court below nevertheless included in its discussion of the Corps' management responsibilities language that is contrary to the "balanced uses" analysis

that the Corps recognizes it must apply. Instead, the court below extracted from the *ETSI* dictum a priority for navigation over other uses of the river.

The question of priorities under the 1944 Flood Control Act has been studied. For example, the United States General Accounting Office in 1992 found that there is "no appropriate basis" to view recreation as a secondary purpose and that recreation is not a use that should "receive only the water left over after other uses are satisfied." GAO, Water Resources: Corps' Management of the Ongoing Drought in the Missouri River Basin, No. 92-4 at 5 (Jan. 1992).

The final EIS for the 2004 Master Manual recognized Congress had not defined any "standard of any kind for management of the recommended purposes" other than the river system's broad purposes, among them "being flood control, irrigation, navigation, power, fish and wildlife, and recreation." 2004 Master Manual § 7-03. (Pet. App. at 16 and n.7.) The Corps' analysis in the EIS concludes that in the Flood Control Act, "Congress did not assign a priority to these purposes" of "flood control, navigation, irrigation, hydropower, . . . recreation, and fish and wildlife. . . ." *Id.*

Under the court's analysis, the Corps will likely misapply the necessary balancing test recognized both by the GAO in 1992, and in the Corps' most recent management document--the 2004 Master Manual. Where the Master Manual is relied upon, and

particularly where it is binding as determined by the Eighth Circuit Court in *Ubbelohde*, the Corps must be free to manage the river system with equal respect and consideration of all uses of the water, as the Act requires.

Without the Court's review, the Corps of Engineers may be required to apply a priority standard contrary to the Flood Control Act of 1944, especially in critical and recurrent drought years.

II. THIS COURT SHOULD INTERVENE TO PROTECT THE RIGHTS OF THE SMALLER UPSTREAM STATES.

If the decision below is left undisturbed, the management of the river reservoirs may be subject to changing political demands for the water inconsistent with both the Flood Control Act and the 2004 Master Manual. The Army Corps of Engineers is no different from any other administrative entity dependent upon Congressional funding authorization for its operation. In river management funding decisions, Congressional weight is greatest among the Lower Basin states, most particularly from Missouri with its nine representatives in Congress, in contrast to a single representative each for the three upstream states of Montana, North Dakota and South Dakota.

If left to p[illegible]l winds, the river uses of the Lower Basin state[illegible] particularly navigation, will trump the three Upper Basin states every time. The magnitude

of the responsibility of balanced use management--recognized in the Act and confirmed by the Corps in the 2004 Master Manual--should not now be left to politics. The decision below does just that by providing a prioritized framework for the Lower Basin states with their greater political influence to lay claim to a disproportional navigational use of the river. The Upper Basin states' concern over the bootstrapping effect of the court of appeals' decision is neither idle nor speculative. As recently as December 16, 2005, Missouri Governor Matt Blunt directly relied on the holding of the court below in demanding that the Corps of Engineers abandon its "spring rise" on the Missouri as outlined in the Draft 2005-2006 Missouri river Annual Operating Plan (Draft AOP), or risk a challenge by the state of Missouri, stating that "[r]ecent rulings of the Eighth Circuit Court of appeals have again clearly stated that flood control and navigation are the dominant purposes of the System." State of Missouri Press Release, "Blunt Asks Corps of Engineers to Forego Spring Rise Experiment."[1]

Review by this Court is necessary to protect upstream states against the leverage of the downstream states' interest in navigation, leverage that is buttressed by the erroneous language from the opinion below. If not reviewed, the lower court's opinion will be used as a sword to subordinate the many balanced uses of the Missouri River system recognized under the Act for years to come.

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[1] http://www.gov.mo.gov/press/MoRiverCorpsPlan121905.htm.

By improperly allocating water for downstream navigation, the court below gave priority to a use that provides less than 1 percent of the Missouri River's economic benefit. (Pet. at 2, citing John E. Thorson, *Voyage of Rediscovery: Lessons from Lewis and Clark for Missouri River Managers*, 6 Great Plains Nat. Resources J., 121, 125 (2002)).

If the Corps is influenced to administer the river in the way directed by the court below, Montana and North and South Dakota will again see their reservoirs drained to record low levels, placing Montana's waters and other resources at risk. Such a management regime will result in substantial economic harm to the upstream states, including Montana.

CONCLUSION

The decision of the court below is inconsistent with the 1944 Flood Control Act and with the Corps of Engineers' Interpretation of the Act. It fails to protect the upstream states' uses of the Missouri River. The state of Montana supports the petition of North Dakota and South Dakota and urges the Court to grant certiorari.

Respectfully submitted,

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January 2006

No. 05-611

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that the Corps recognizes it must apply. Instead, the court below extracted from the *ETSI* dictum a priority for navigation over other uses of the river.

The question of priorities under the 1944 Flood Control Act has been studied. For example, the United States General Accounting Office in 1992 found that there is "no appropriate basis" to view recreation as a secondary purpose and that recreation is not a use that should "receive only the water left over after other uses are satisfied." GAO, Water Resources: Corps' Management of the Ongoing Drought in the Missouri River Basin, No. 92-4 at 5 (Jan. 1992).

The final EIS for the 2004 Master Manual recognized Congress had not defined any "standard of any kind for management of the recommended purposes" other than the river system's broad purposes, among them "being flood control, irrigation, navigation, power, fish and wildlife, and recreation." 2004 Master Manual § 7-03. (Pet. App. at 16 and n.7.) The Corps' analysis in the EIS concludes that in the Flood Control Act, "Congress did not assign a priority to these purposes" of "flood control, navigation, irrigation, hydropower, . . . recreation, and fish and wildlife. . . ." *Id.*

Under the court's analysis, the Corps will likely misapply the necessary balancing test recognized both by the GAO in 1992, and in the Corps' most recent management document--the 2004 Master Manual. Where the Master Manual is relied upon, and

particularly where it is binding as determined by the Eighth Circuit Court in *Ubbelohde*, the Corps must be free to manage the river system with equal respect and consideration of all uses of the water, as the Act requires.

Without the Court's review, the Corps of Engineers may be required to apply a priority standard contrary to the Flood Control Act of 1944, especially in critical and recurrent drought years.

II. THIS COURT SHOULD INTERVENE TO PROTECT THE RIGHTS OF THE SMALLER UPSTREAM STATES.

If the decision below is left undisturbed, the management of the river reservoirs may be subject to changing political demands for the water inconsistent with both the Flood Control Act and the 2004 Master Manual. The Army Corps of Engineers is no different from any other administrative entity dependent upon Congressional funding authorization for its operation. In river management funding decisions, Congressional weight is greatest among the Lower Basin states, most particularly from Missouri with its nine representatives in Congress, in contrast to a single representative each for the three upstream states of Montana, North Dakota and South Dakota.

If left to political winds, the river uses of the Lower Basin states, particularly navigation, will trump the three Upper Basin states every time. The magnitude

of the responsibility of balanced use management--recognized in the Act and confirmed by the Corps in the 2004 Master Manual--should not now be left to politics. The decision below does just that by providing a prioritized framework for the Lower Basin states with their greater political influence to lay claim to a disproportional navigational use of the river. The Upper Basin states' concern over the bootstrapping effect of the court of appeals' decision is neither idle nor speculative. As recently as December 16, 2005, Missouri Governor Matt Blunt directly relied on the holding of the court below in demanding that the Corps of Engineers abandon its "spring rise" on the Missouri as outlined in the Draft 2005-2006 Missouri river Annual Operating Plan (Draft AOP), or risk a challenge by the state of Missouri, stating that "[r]ecent rulings of the Eighth Circuit Court of appeals have again clearly stated that flood control and navigation are the dominant purposes of the System." State of Missouri Press Release, "Blunt Asks Corps of Engineers to Forego Spring Rise Experiment."[1]

Review by this Court is necessary to protect upstream states against the leverage of the downstream states' interest in navigation, leverage that is buttressed by the erroneous language from the opinion below. If not reviewed, the lower court's opinion will be used as a sword to subordinate the many balanced uses of the Missouri River system recognized under the Act for years to come.

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[1] http://www.gov.mo.gov/press/MoRiverCorpsPlan121905.htm.

By improperly allocating water for downstream navigation, the court below gave priority to a use that provides less than 1 percent of the Missouri River's economic benefit. (Pet. at 2, citing John E. Thorson, *Voyage of Rediscovery: Lessons from Lewis and Clark for Missouri River Managers*, 6 Great Plains Nat. Resources J., 121, 125 (2002)).

If the Corps is influenced to administer the river in the way directed by the court below, Montana and North and South Dakota will again see their reservoirs drained to record low levels, placing Montana's waters and other resources at risk. Such a management regime will result in substantial economic harm to the upstream states, including Montana.

CONCLUSION

The decision of the court below is inconsistent with the 1944 Flood Control Act and with the Corps of Engineers' Interpretation of the Act. It fails to protect the upstream states' uses of the Missouri River. The state of Montana supports the petition of North Dakota and South Dakota and urges the Court to grant certiorari.

(9)

Supreme Court, U.S.
FILED
FEB 24 2006
OFFICE OF THE CLERK

No. 05-611

In The Supreme Court of the United States

STATE OF NORTH DAKOTA
and STATE OF SOUTH DAKOTA,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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ARGUMENT

I. The court of appeals' ruling that the Flood Control Act gives navigation a priority is not dictum, and it is a ruling that harms the Dakotas.

A. Dictum. Federal respondents assert that the Eighth Circuit's ruling that the 1944 Flood Control Act[1] gives navigation a priority had no bearing on its decision and that the ruling is mere dictum. U.S. Brf. in Oppos. at 9-10. The discussion of navigation and its priority was not, however, a mere aside. Pet. App. at 15-16.

Downstream interests asserted that the 2004 Master Manual violates the Flood Control Act. Pet. App. at 12-13. The Eighth Circuit was thus required to interpret the Act and decide what, if any priorities it sets and whether the new Manual is consistent with them. The court found that the Act gives navigation a priority and that the Manual is valid because it is consistent with this priority and other terms of the Flood Control Act. In particular, the court stated that a "'dominant function[]'" of the Act is "'to maintain downstream navigation,'" and that under the Act recreation and wildlife are "'secondary uses.'" Pet. App. at 15 (citing *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), *cert. denied, North Dakota v. Ubbelohde*, 541 U.S. 987 (2004)). "'[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration . . . that ruling becomes the law of the circuit.'" *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) (quoting *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001)

[1] Pub. L. No. 78-534, 58 Stat. 887 (1944).

(Kozinski, J., concurring)). Addressing whether the Flood Control Act assigns priorities was not only germane but necessary to assess the Master Manual's legality.

Determining priorities was also necessary to review challenges to the manner in which federal agencies complied with the Endangered Species Act ("ESA").[2] Pet. App. at 17-19. The State of Nebraska and the Nebraska Public Power District ("Nebraska Parties") asserted that the Corps should not have engaged in ESA consultations with the U.S. Fish & Wildlife Service because to do so would interfere with the navigation-priority mandated by the Flood Control Act. *Id.* at 17-18. The court rejected the claim, finding that ESA compliance did not necessarily "prevent the Corps from meeting its statutory duty under the FCA to support downstream navigation." *Id.* at 19. The court, however, added that if ESA compliance were to jeopardize navigation, then "the ESA would not apply." *Id.* at 19 n.9.

In a companion "Missouri River Litigation" decision, the navigation-priority was further applied by the Eighth Circuit. North Dakota sought to apply water quality standards it adopted under the Clean Water Act[3] to the Corps' Garrison Dam operations. *In re Operation of Missouri River System Litigation*, 418 F.3d 915, 916-17 (8th Cir. 2005). The court affirmed the suit's dismissal. A reason for doing so was its conclusion that state water quality standards are pre-empted. *Id.* at 919-20. The Flood Control Act makes navigation a dominant function and if

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[2] 16 U.S.C. §§ 1531 *et seq.*

[3] 33 U.S.C. §§ 1251 *et seq.*

state water quality standards were to apply that "would frustrate the design of the [Act]." *Id.* at 920.

Given the clarity and role of the Eighth Circuit's navigation-priority ruling in the decision below, coupled with its 2003 *Ubbelohde* decision, that court would be surprised at the suggestion that its construction of the Flood Control Act is mere dictum. The court's 2003 and 2005 rulings resolving disputes over the Act's purposes and priorities make it unlikely it will again consider the issue. Indeed, the Eighth Circuit essentially confirmed the precedent-setting nature of its ruling in rejecting North Dakota's Clean Water Act suit. "The dominant functions of the project are flood control and downstream navigation, and secondary interests include irrigation, recreation, fish and wildlife." *Missouri River Litigation*, 418 F.3d at 919.

The government is alone in its constricted view of the decision. Downstream interests assert that the court issued a precedent-setting ruling. Missouri Brf. in Oppos. 2-3; Neb. Brf. in Oppos. 1, 9-10, 16. And they rely on it to protect downstream interests. *E.g.*, Letter from Missouri Gov. Blunt to Corps of Engineers at 3 (Dec. 16, 2005) ("The Eighth Circuit . . . stated that navigation is one of the two dominant purposes . . . Therefore, any water used to support fish and wildlife should not be at the expense of navigation").[4] Other parties agree that the court's navigation-priority ruling was not dictum. Envt'l Defense & Nat'l Wildlife Fed'n Brf. in Support of Pet.; Montana Amicus Brf. in Support of Pet.; Mandan, Hidatsa, and Arikara

[4] The letter is at http://gov.missouri.gov/press/AOP-letter12-16-05.pdf.

Nation and Cheyenne River Sioux Tribe Amicus Brf. in Support of Pet.

B. Harm. It is asserted that the petition should be denied because the Dakotas are not adversely affected and that any harm is speculative. U.S. Brf. in Oppos. 7, 10-11; Missouri Brf. in Oppos. 3-4. The basis for this argument is that the Dakotas did not appeal the district court's decision to uphold the Corps' 2004 Master Manual and the Eighth Circuit affirmed that ruling.

The Dakotas sought a judgment declaring that the Flood Control Act does not give navigation a priority but requires equitable treatment of all uses. *E.g.*, S.D. Third Amended Cmplnt. at ¶ 72; N.D. Third Amended Cmplnt. at ¶¶ 82-86. The Dakotas prevailed in the district court, which held that the Pick Plan "did not rank any river interest above another" and that the Sloan Plan "does not dictate priority of river interests." Pet. App. at 40. "[T]he Corps must consider, evaluate, and balance all interests." *Id.* at 88. *See also id.* at 41-42. The court also upheld the new, 2004 Master Manual, and it does not contain the navigation-priority language found in the 1979 Manual. The new Manual states just the opposite. "Congress did not assign a priority to [project] purposes. Instead, it was contemplated that the Corps . . . would balance these functions in order to obtain the optimum development and utilization of the water resources of the Missouri River basin to best serve the needs of the people." 2004 Master Manual at VII-1.

Because the Dakotas obtained the construction of the Act they sought and obtained a substantially revised Master Manual, they did not appeal the district court's decision. Though the Eighth Circuit affirmed, in doing so

it resurrected, to the Dakotas' detriment, the navigation-priority. It established a legal regime governing the river and how the Corps will implement the Master Manual. Upstream reservoirs will be operated for downstream barges. The holding below revived an obsolete principle under which the Corps had managed the river and which led to present, dangerously low reservoir levels.[5]

Had the Corps not been releasing so much water to support navigation, particularly during the drought's early years, upper basin problems would be less pronounced. Upstream reservoirs recently set record low elevations. U.S. Army Corps of Engineers, *Missouri River Mainstem System 2005-2006 Annual Operation Plan* at 17 (Jan. 2006) ("2006 AOP"). Some communities in the Dakotas lost their water supply due to the low water, and others are on the brink of losing theirs.[6] Farmers needing irrigation have lost their water source.[7] Low water has caused quality problems for drinking water.[8] Access to lakes via boat ramps has been disrupted and businesses dependent on lake recreation have suffered and some have closed.[9]

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[5] Though federal officials have often stated that navigation does not have a priority, Pet. at 22-23, the 1979 Master Manual expressed a navigation-priority and the Corps considered itself bound to apply the priority until the Manual could be revised.

[6] *E.g.*, Pet. at 9 n.4; Mandan, Hidatsa, and Arikara Nation and Cheyenne River Sioux Tribe Amicus Brf. in Support at 4 n.3; 2006 AOP at 28-29.

[7] *E.g.*, JA at 00334 (Priner Decl.); JA at 05218 (Hoeven and Rounds letter); JA at 01404-21 (Rath Aff.).

[8] *E.g.*, JA at 00332 (Priner Decl.).

[9] *E.g.*, JA at 00336-340 (Cooper Decl.); JA at 01466-67 (Power Aff.).

And, of course, low water has damaged fisheries.[10] Indeed, the origins of this litigation rest in the Dakotas' effort in 2002 to save the crucial spring smelt spawn in Lakes Sakakawea and Oahe, which the Corps was willing to destroy to protect navigation; and in 2002 Lake Sakakawea's smelt biomass declined 90%.[11]

As a district court stated, "it is clear . . . that the Corps, in times of low water flows . . . always chooses to seriously impact upstream states to continue navigation . . . The more dire the water conditions upstream, the more water that is being released." *South Dakota v. Ubbelohde*, CIV 02-3011 Prelim. Injunc. at 7 (D.S.D. May 13, 2002). Under the decision below – in which the government finds no harm – the Eighth Circuit even permits the Corps to *abandon* upstream interests should navigation so require. Pet. App. 16 n.7.

To assert that concerns about a navigation-priority are mere speculation is ill-founded and ignores history. The de facto priority under which the Corps has been operating, and which has resulted in record low elevations leading to diverse harmful consequences, is now de jure. And navigation's water needs are "lavish." John H. Davidson & Thomas Earl Geu, *The Missouri River and Adaptive Management: Protecting Ecological Function and Legal Process*, 80 Neb. L. Rev. 816, 836 (2001). During droughts there will not be much water for the Dakotas – the water will be used to float barges under an irrational regime, one that would prefer navigation, which at best provides a $9

[10] *E.g.*, JA at 00339-40 (Cooper Decl.); JA at 00118-19 (Hendrickson Aff.); JA at 00126-128 (Power Aff.).

[11] JA at 00118 (Hendrickson Aff.).

million annual economic benefit, Pet. at 7, over hydropower, recreation, and water supply and their $674 million, $87 million, and $611 million annual benefits. JA at 07196-98. It is beyond dispute that a navigation-priority harms the upper basin.

C. Summary. The decision below was a significant blow to the Dakotas' effort to obtain a ruling that the Corps must not play favorites. The decision establishes a legal regime governing the river's future. It defines the law of the river. It is neither dictum nor an inconsequential decision without adverse affects for the Dakotas.

II. The court of appeals made errors of law.

Missouri and the Nebraska Parties argue that the Flood Control Act does, in fact, give navigation a priority. Missouri cites the Act's opening statement and its reference to "'navigation and flood control.'" Missouri Brf. in Oppos. at 5. But this language does not establish priorities. It articulates the authority under which Congress exercised jurisdiction over the river in accordance with the implicit requirement for such a statement. *See United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 63 (1913). And in the same sentence that Missouri cites, Congress added:

> it is hereby declared to be the policy of the Congress . . . to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers . . . and to limit . . . navigation works to those . . . which can be operated consistently with appropriate and economic use . . . of such rivers by other users.

Pet. App. at 90.

Though the Nebraska Parties present a number of arguments for their view of the Act, Neb. Brf. in Oppos. at 9-13, we will not respond point-by-point to them. Most of these issues have been addressed. Pet. at 14-22. It will suffice to note that the Joint Report, authored by the Bureau of Reclamation and Corps of Engineers to reconcile their Pick and Sloan Plans, was adopted by Congress as a part of the Flood Control Act. Pet. App. at 97. The Report, and thus the Act, states that the Missouri River Basin is to be developed to "secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." *Id.* at 109. There is no priority here. Congress named many uses for which the river is to be managed but did not assign priorities to them.

The Nebraska Parties assert that the Dakotas want the courts to "second guess" the wisdom of policy choices expressed in the Act. Neb. Brf. in Oppos. at 1, 8, 19. To the contrary, we ask this Court to confirm the Act's plain requirements, that is, that all project purposes – navigation, farmland irrigation, recreation, power generation, wildlife, domestic and industrial water supply – be equitably considered and balanced. The Nebraska Parties state that the Dakotas want the system operated for recreation and wildlife "to the exclusion of flood control and navigation." *Id.* at 14. This too misrepresents our position. We acknowledge that flood control has priority and do not assert that the Corps must protect upstream interests to the "exclusion" of others. But recreation and wildlife drinking water, irrigation, and hydropower should not be tossed to the end of the line, always deferring to navigation.

CONCLUSION

In its 2003 *Ubbelohde* decision, the Eighth Circuit seemed to interpret the Flood Control Act as giving navigation a priority. That it did indeed do so is confirmed by the decision below. That decision now governs Missouri River management. It affects the interests of citizens, state and tribal governments, businesses, and sportsmen in one of America's pre-eminent resources. It is a fundamentally important decision worthy of review. Further, it limits the Clean Water Act and could be used to limit the Endangered Species Act, two prominent environmental laws. The Petition should be granted.

Respectfully submitted,

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FEBRUARY 2006